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THE HAGUE PEACE  
CONFERENCES

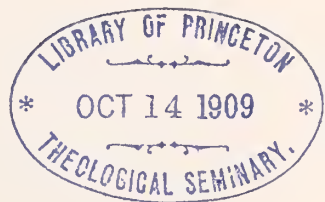
1899 AND 1907

At the thirteenth annual meeting of the Mohonk Conference on International Arbitration, Mr. Eugene Levering of Baltimore, Maryland, generously offered a sum of money to be devoted to advancing the aims of the Conference. In accepting the gift the Conference directed that the fund be expended under the auspices of the Johns Hopkins University. Believing that the fund would be best expended in making known the achievements of the Hague Peace Conferences, the University authorities asked Mr. James Brown Scott, Solicitor for the Department of State and Technical Delegate of the United States to the Second Conference, to deliver a course of lectures upon the work and result of the Conferences. Mr. Levering's generous donation has been employed in defraying the expenses of this publication.

# THE HAGUE PEACE CONFERENCES

OF

1899 AND 1907



A SERIES OF LECTURES DELIVERED BEFORE THE  
JOHNS HOPKINS UNIVERSITY IN THE YEAR 1908

BY



JAMES BROWN SCOTT

TECHNICAL DELEGATE OF THE UNITED STATES TO THE SECOND  
PEACE CONFERENCE AT THE HAGUE

ASSOCIATE OF THE INSTITUTE OF INTERNATIONAL LAW

*The true honor and dignity of the nation are inseparable from justice.*

—ALBERT GALLATIN.

IN TWO VOLUMES

VOLUME I - CONFERENCES

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TO ELIHU ROOT AND ROBERT BACON

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## PREFACE

The following chapters are based upon a series of lectures delivered before the Johns Hopkins University in the year 1908. The lectures have been carefully revised and much enlarged. The substance, however, remains unaltered and the conversational style has been preserved.

In revising the lectures references have been added to the *Conférence Internationale de la Paix*, the official publication of the Dutch Government for the first Conference and, as far as published, to the *Deuxième Conférence Internationale de la Paix*, the official publication for the second Conference, of which only the first of the three volumes has appeared. Frequent references have been made in the footnotes to works of authority in order to substantiate the statements of the text and to enable the reader to continue his investigation should he so desire.

In the elaboration of the lectures quotations have been made from official sources and from works of authority too numerous and too extended for delivery within the limitations of the lecture-room.

The first three chapters are in the nature of an introduction to the Conferences and give a survey of their positive results. The fourth chapter states the composition and personnel of the delegations and seeks to show the influence exercised by the delegations and important delegates. The subsequent chapters analyze the various conventions, declarations, resolutions and *vœux* of the Conferences generally in the order of the Final Acts.

The second volume contains the instructions to the American Delegations, their official reports, the diplomatic correspondence preceding the Conferences and the texts which, matured at the Conferences and ratified by the participating Powers, have become international law.

By these means it is hoped that the work offered to the reader presents the material necessary for a correct understanding of the origin and nature of the Conferences and the importance of their deliberations.

JAMES BROWN SCOTT.

Department of State,  
January, 1, 1909.

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THE HAGUE PEACE  
CONFERENCES

1899 AND 1907

CONFERENCES



## CHAPTER I

### THE GENESIS OF THE INTERNATIONAL CONFERENCE

#### 1. ANALOGY BETWEEN GROWTH OF COMMON LAW AND LAW OF NATIONS

The Second International Peace Conference, like its predecessor of 1899, endeavored to humanize the hardships necessarily incident to war and to substitute for a resort to arms a pacific settlement of international grievances, which, if unsettled, might lead to war or make the maintenance of pacific relations difficult and problematical. The Conference of 1907, no more than its immediate predecessor, satisfied the leaders of humanitarian thought. War was not abolished, nor was peace legislated into existence. Universal disarmament, or, indeed, any restriction of armament, was as unacceptable in 1907 as in 1899, and some few nations were still unwilling to bind themselves to arbitrate international disputes not involving independence, vital interests, or national honor.

Deeply interested in the success of these projects, the great public felt that their failure necessarily involved the failure of the Conference, notwithstanding that many wise and humanitarian measures falling short of the goal were incorporated into the law of nations. But we should not in our disappointment, and perhaps bitterness of soul, overlook positive and beneficent progress, and if the Conference did not take the advanced position outlined by the friends of peace, we may nevertheless rejoice that many a mile-stone has been passed. We must not forget that an international conference differs from a parliament; that independent and sovereign nations are not bound by majorities, and that positive results are

obtained by compromising upon desirable but perhaps less advanced projects. The aim of a conference is to lay down a law for all, not for the many, much less for the few; to establish a law which will be international because it is accepted and enforced by all nations.

The work of the conference concerned the modification of existing international law: international differences of opinion and interpretation were adjusted; doubt gave place to certainty; and, after much consideration and reflection, principles of international law were fortified, modified in part, or wholly discarded. A complete code was not outlined—it is doubtful whether custom and usage are ripe for codification—but important topics of international law were given the symmetry and precision of a code.

It may be maintained that international law is law in the strict sense of the word, or it may be contended that it lacks an essential element of law, because there is no international sheriff: that it is international morality or ethics; or that finally a law of nations is the occupation of the theorist and the hope of the dreamer. However opinions may differ as to the nature of international law, there can be no doubt of the existence of certain rules and regulations which do by common consent control the conduct of independent nations, nor can there be any reasonable doubt that enlightened people of all countries take a deep and abiding interest in international law, and share the hope of the dreamer, not only that greater definiteness may be given to its principles, but that the principles themselves may be developed and applied with the regularity, certainty and accuracy of a municipal code.

From the cell of the cloister international law passed into the study of the philosopher, the jurist, and the scholar; from the study it entered the cabinets of Europe, and for two centuries and more a recognized system of international law has determined the foreign relations of nations; from the cabinet to courts of justice, where the rights of nations, as well as individuals have been debated and declared; and finally, from the court-room, international law has made its way to the people,

who, in last resort, dominate court and cabinet, and enlist in their service scholar as well as priest.

It was a wise remark of Sir James Mackintosh that constitutions are not made; they grow, for history demonstrates that unnatural unions dissolve; that unnatural alliances have little permanency; that constitutions struck off at the heat of a moment in times of excitement disappear with the causes to which they owe their origin. Constitutions are, in a large and broad sense of the word, codifications. They put into written and permanent form the usages and customs of the past, and they last because the spirit underlying these usages and customs is wrapped up with the existence and destiny of the people. The Constitution of the United States has lasted, because it was based upon the usages and customs of England, as modified by the experience in the colonies, and the Constitution will last as long as it answers the needs of its framers, and no longer. To understand, however, the Constitution, English customs and usages must be studied, and to predict the lines of development we must interpret the language of the Constitution in the light of its origin, and apply it to the concrete case under investigation. It is the same with law. Law is not imposed as a system upon the people. Isolated usage develops into habit; the habit becomes crystallized into custom; and to custom there is given, consciously and unconsciously, the force of law.

The common law of England is not due to the wisdom of any one person or of any one age. It grew to meet a need; it changed with that need, and disappeared when it could no longer subserve a useful purpose. It is a growth, an organism, not a crystallization.

When, however, the process of development did not keep abreast of the age, or when new and unsuspected needs required special treatment, statutes made their appearance to supply the lack or to correct the evil. The statute would be special if a special point were involved. The statute would be general in its terms if the evil to be corrected was general, or the need of the statute was of a general, wide-spread nature.

The more rapid the development of the country, the greater and more diversified become the needs of an enterprising and progressive community, and, consequently, the more frequent would be and must be the resort to statutory enactments, in order to safeguard the rights and interests created as the result of changed conditions. It follows, therefore, that a system of law in its early stages springs directly out of the needs of the people. If the needs be simple, the law, of which custom is the very life, is simple. It is said to be unwritten in the sense that no custom is at once the law and the evidence, although in process of time the customs are naturally reduced to writing by people learned in customary law, and it is given precision by decrees of courts of justice. Complex situations give rise to a complex system of law, and the natural development of custom not being sufficient, the legislature steps in by statute to accelerate the development and to give to the system of law the clearness, the solidity, and the refinement necessary for a complicated and progressive civilization. In this development, then, we have the local usage, the custom, and the statute.

If we turn from the common law to international law, we find that the course of development of the common law of nations has been singularly like that of the common law of England.

We first have the usages of enlightened nations. These usages spread, gain weight and influence by repeated application. We next find that the usages have taken on the form of custom, and nations from isolated or frequent usage regard the custom as binding upon them. That which is claimed as a right on the one side becomes a duty on the other, for right and duty are correlative. The demand in itself is a consent to the rule of law. The yielding to the demand is an acknowledgment of the rightfulness of the custom.

We thus have customary rules and regulations binding nations in their mutual intercourse, because the nations, either by enforcing the custom or yielding to the custom sought to be enforced, have given to the custom the weight of law. But



just as the common law of England grew slowly, indeed, imperceptibly, so have the usages of nations developed slowly and imperceptibly. When nations had little intercourse with one another, the need for a system of law regulating such relations was scarcely felt. As nations grew and came into closer contact, it necessarily followed that the usages and customs of nations were developed in order adequately to meet changed conditions. The independence of the state is the very postulate of international law; but the solidarity of interest has made itself felt to such a degree that nations have yielded and must in the future yield something of their absolute liberty and independence, just as a citizen yields his absolute freedom for the benefit of society, of which he is a part.

We see, then, from this brief and imperfect sketch of the origin and nature of the common law of one particular jurisdiction, an analogy between the common law of nations, namely, the usages and customs of many nations. We find, or at least we can assume, that when only one nation existed there could be no international law; two nations existing would have comparatively little intercourse and the rules and regulations governing their intercourse would, therefore, be simple. As the two gave place to the many, and as intercourse became very frequent, the need of a more elaborate code would become evident. Usage and custom would grow to meet the need, and in the course of time, insensibly and imperceptibly, usage and custom would take the dimensions of a code. While this is true generally, it is true with much greater force in the present and, indeed, in the immediate past; for the discovery of North and South America, and the contest for the possession of this world; the establishment of colonies with the various colonial systems, and the conflicts of interest that necessarily arose, would require a system of law adequate to settle them; and when nations became more closely connected, more intimately and frequently involved, it followed that the simplicity of the earlier usages and customs would either give place to a more complicated code, or would themselves be developed in order to meet the growing needs.

As nations thus became more closely united or related, previous usage or custom was found to be inadequate; but the spirit pervading the usage or custom was discovered and developed, precisely as the spirit in the common law was developed in order to meet a changed condition of affairs. Just as in appropriate cases the municipal legislature stepped in and corrected an abuse or covered a field by statute, conferences were held between rulers, treaties were negotiated to regulate a specific concrete controversy, and finally congresses, not at the beginning but at the end of the controversy, composed of many states, because the interests of many were concerned, were convened in order that that might remain settled in peace which had been established in war. The conference or congress is, it would seem, not far removed from an international legislature, whose acts are submitted *ad referendum* to the participating nations.

We therefore find that treaties mark the first general step in the development of the law of nations as between nations in recent years, for it is only in the modern world that treaties have gone far to correct uncertainty, to remove irregularity and to establish a system of international relations. The special or individual treaties will be comparatively simple in the other respects. When the many were involved, a congress or conference came naturally into being, with the result that in this conference the questions causing the conflict would be considered and regulated, in the hope of preventing a recurrence of the conflict. The conferences and congresses were at the conclusion of a dispute. The appeal was indeed to reason, but it was unfortunately belated.<sup>1</sup> Interesting examples of

<sup>1</sup> In speaking of Lord Castlereagh's attitude and action at the Congress of Vienna, Richard Cobden said in his arbitration speech June 12, 1849, in the House of Commons: "I want to know, whether as good men as Lord Castlereagh could not be found to settle these matters *before*, as *after*, a twenty years' war?"

"All I want is, that this should be done *before*, and not *after*, engaging in a war—done to avert the war, rather than to make up the difference after the parties are exhausted by the conflict."—*Speeches on Questions of Public Policy*, by Richard Cobden, Vol. II, pp. 392-393.

The advantages of a conference called to settle in advance international



the post-mortem appeal to reason are furnished by the Treaty of Westphalia (1648), the various treaties of Utrecht (1713-1714), the Congress of Vienna (1814-15), the Congress of Paris (1856), and the Congress of Berlin (1878).

## 2. CONFERENCES AT TERMINATION OF WAR

These congresses, however differing in importance and in influence upon future development, have this point in common: that they were preceded by war; that they owed their very existence to war, and that they could not, from the nature of things, have met in peace. They settled the immediate controversy submitted to them and were, to this extent, peace conferences. Summoned for a special purpose, their results were mainly limited to the object of the call, but they not infrequently expressed views on broader questions of general interest. These stipulations, whether declaratory or amendatory of international law, and however unconscious, limited in extent and tentative in their nature, were in reality statutory enactments. As such, they have a general interest and have survived the particular treaties to which they were incidental. Indeed the elaborate treaties are valuable today solely or largely on account of their general provisions. This is especially and increasingly so with the later congresses, of which the congress of Paris of 1856 is the most striking example. Important in themselves, they are doubly important to us as showing the possibility of a congress and as furnishing precedents for the codification of international law.

difficulties over a conference meeting at the end of a war for the settlement of controversies have never been better stated than in the following passage taken from the speech of the King of Portugal in opening the Cortese:

"Congresses which assemble in consequence of wars only sanction, as a rule, the advantages secured by the strongest; and the treaties which result from such congresses rest on accomplished facts rather than on right. They create forced situations, ending in general uneasiness, and producing protests and armed demands. A congress before war, and intended to prevent war is, to my mind, a generous idea favoring progress."

Gennadius: *Record of International Arbitration* (1904), p. 78.

The possibilities of the international congress were lost neither upon the participants nor public opinion and we thus find that conferences assemble in time of peace, although preceded by war for the express purpose of determining in advance of war rules and regulations for the conduct of hostilities. The fragmentary statute of the war-congress has shown the usefulness of statutory regulation and the advisability of settling consciously and without the excitement and commotion of war, questions of interest to possible belligerents as well as to the actual contestants in a particular war. This second great group of conferences begins to appear in the latter half of the nineteenth century and include the Red Cross or Geneva Conferences of 1864 and 1868; the Conference of St. Petersburg, resulting in the Declaration of St. Petersburg of 1868; and the Conference of Brussels of 1874 for the codification of the laws and customs of war.

These gatherings were indeed preceded by war, but were not assembled to end any particular war, and determine the conditions of peace. Differing widely in their nature and importance, they have this point in common, that they were due to private initiative, although convoked by an enlightened state or sovereign in response to public opinion. The Congress of Berlin of 1884-1885 called for the purpose of recognizing the Congo and for determining the interests of the Great Powers in the colonization of Africa, is not only important in itself but furnishes the example of an international conference neither preceded nor followed by a war, but bent solely upon the prevention of international conflict by international legislation.

The Panama Congress of 1826 and especially the Pan-American Conference of 1889-1890, due to the personal initiative and foresight of Mr. James G. Blaine, should be mentioned because they show that the American continent was not only familiar in theory but in practice with the idea of a conference for the pacific settlement of international conflicts, and that America as a unit favored arbitration as a substitute for force.

The third step in the development of the international congress is the Hague Peace Conference of 1899, followed by

the Second Conference of 1907—precursors, it is hoped, of a series of congresses summoned in time of peace for the preservation of the world's peace.

I shall now consider briefly each group and its most important members.<sup>1</sup>

The Treaty of Westphalia was negotiated by representatives of the countries engaged in the Thirty Years' War, and the state of affairs established was hoped to be durable.

The Peace of Westphalia—consisting of the two treaties of Münster, where the French made peace with the Empire, and of Osnabrück, where the Swedes negotiated with the Emperor and the smaller German powers—was in reality a legislative act, for it not only put an end to the Thirty Years' War, but adjusted the relations of a large part of Europe. Switzerland, long independent and severed from the Empire, was acknowledged to be independent in law as well as in fact. In the same way, while the Peace of Westphalia was being negotiated, Holland and Spain came to separate terms at Münster, by which the freedom and sovereignty of the United Provinces were recognized.

It is beyond the present purpose to state in detail the provisions of the Treaty of Westphalia. It is sufficient to show that a conference of interested powers assembled, in order, by an appeal to reason, to substitute order for disorder, and by a recognition, however imperfect, of the rights of others to secure law and order for themselves.

The actual results and the importance in international law of the various conferences known generically as the Peace of Westphalia, are admirably stated by our countryman, Wheaton, from whose *History of the Law of Nations*, the following paragraphs are quoted:

<sup>1</sup> For a list of important international conferences, congresses or associations of official representatives of governments, exclusive of war Conferences, see *American Journal of International Law*, Vol. I (1907), pp. 808-829. See also in the same volume Judge Simeon E. Baldwin's article on *International Congresses and Conferences of the Last Century as Forces Working toward the Solidarity of the World* (pp. 575-578) and Professor Reinsch's *Article on International Unions and their Administration* (pp. 579-623).

The Peace of Westphalia, 1648, may be chosen as the epoch from which to deduce the history of the modern science of international law. This great transaction marks an important era in the progress of European civilization. It terminated the long series of wars growing out of the religious revolution accomplished by Luther and Calvin, and the struggle commenced by Henry IV and Richelieu, and continued by Mazarin against the political preponderance of the house of Austria. It established the equality of the three religious communities of Catholics, Lutherans, and Calvinists in Germany, and sought to oppose a perpetual barrier to further religious innovations and secularizations of ecclesiastical property. At the same time it rendered the states of the empire almost independent of the emperor, its federal head. It arrested the progress of Germany towards national unity under the Catholic banner, and prepared the way for the subsequent development of the power of Prussia—the child of the Reformation—which thus became the natural head of the protestant party and the political rival of the house of Austria, which last still maintained its ancient position as the temporal chief of the Catholic body. It introduced two foreign elements into the internal constitution of the empire—France and Sweden as guaranties of the peace, and Sweden as a member of the federal body—thus giving to these two powers a perpetual right of interference in the internal affairs of Germany. It reserved to the individual states the liberty of forming alliances among themselves as well as with foreign powers, for their preservation and security, provided these alliances were not directed against the emperor and the empire, nor contrary to the public peace and that of Westphalia. This liberty contributed to render the federative system of Germany a new security for the general balance of European power. The Germanic body, thus placed in the center of Europe, served by its composition, in which so many political and religious interests were combined, to maintain the independence and tranquillity of all the neighboring states. . . .

The peace of Westphalia continued to form the basis of the conventional law of Europe, and was constantly renewed and confirmed in every successive treaty of peace between its central states until the French revolution. . . .

The peace of Westphalia, closing the age of Grotius, coincides with the foundation of the new school of public jurists, his disciples and successors in Holland and Germany. The peace completed the code of the public law of the empire, which thus became a science diligently cultivated in the German universities, and which contributed to advance the general science of European public law. It also marks the epoch of the firm establishment of permanent legations, by which the pacific relations of the European states have been since maintained;



and which, together with the appropriation of the widely diffused language of France, first to diplomatic intercourse, and subsequently to the discussions of international law, contributed to give a more practical character to the new science created by Grotius and improved by his successors.<sup>1</sup>

In view of the fundamental importance of the Congress of Westphalia and of its transcendent value as a precedent for further conferences, and in view likewise of the demonstration afforded by it that a permanent state of affairs may be established by an appeal to reason, even if the appeal was made at the end of a war which had broken the body and curbed the spirit of the strongest, inclining alike to peace men of affairs and dreamers of dreams, a further quotation is made from an authoritative and conservative writer:

“The actual state system of the civilized world,” says the venerable Professor Westlake, “dates from the Peace of Westphalia, which closed the Thirty Years’ War in 1648. The intercourse between most European states had previously been intermittent, but the multitude of representatives assembled at the Congress which concluded that peace was in itself an affirmation of the existence of a body of states whose interests, whether agreeing or clashing, did not permit them to be strangers to one another, and ever since then it has been the practice for every state belonging to the system to be permanently represented at the capitals of the other states by resident ambassadors or ministers of inferior rank. The principle of accepting accomplished facts as the ground of international relations was exemplified in a striking manner by the recognition of the independence of the United Netherlands and Switzerland, and by the acknowledgment of the right of the princes and cities comprised within the Holy Roman Empire to contract diplomatic engagements with each other and with states outside the empire, subject only to the condition, which there were no means of enforcing, that their engagements should not be prejudicial to the empire or the emperor. The tendency to base international relations on general grounds of principle, so far as facts permit, was strongly promoted by the great number of the states which thus enjoyed unquestioned sovereignty, while many of them were so weak that there could be little safety

<sup>1</sup> Henry Wheaton’s *History of the Law of Nations in Europe and America from the Earliest Times to the Treaty of Washington, 1842*, pp. 69–72.

for them if grounds of principle were abandoned. And it is established that the principles to be admitted were secular: the pope's claim to supreme temporal authority was obsolete, and now the Protestant states in Germany were firmly placed on an equal footing with the Catholic ones. The modern international society was thus founded, and the states which belonged to it in 1648, including those which continue their identity under different names and with varied limits, as Savoy became Sardinia and Sardinia Italy, may be called its original members. Since 1648, without reckoning the growing intercourse with states of various Oriental civilizations, new members have been added to the full international society by many different processes."<sup>1</sup>

The Peace of Westphalia, which established national and international relations upon a basis of substantial equality, and thus marks a starting point in the modern law of nations, should not be dismissed without a reference to the immortal work of Grotius, which owed its existence to the horrors and bloodshed of the Thirty Years' War.<sup>2</sup>

The possibilities of the international congress were foreseen by Grotius and outlined within the compass of a much quoted paragraph.

"It would be useful," he says, "and indeed it is almost necessary, that certain Congresses of Christian Powers should be held, in which the controversies which arise among some of them

<sup>1</sup> Westlake's *International Law*, Part I, *Peace*, pp. 44-45.

<sup>2</sup> I, for the reasons which I have stated, holding it to be most certain that there is among nations a common law of Rights which is of force with regard to war, and in war, saw many and grave causes why I should write a work on that subject. For I saw prevailing throughout the Christian world a license in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorized to commit all crimes without restraint.—GROTIUS. *De Jure Belli ac Pacis*, Prolegomena, Sec. 28.

If the Thirty Years' War thus provoked the first masterpiece of international law, upon whose broad and firm foundation a stately structure has been reared, the Peace of Westphalia was the first modern realization of the doctrines propounded in the book as a substitute for the warfare which Grotius sought to regulate and humanize, until reason would furnish an adequate and acceptable substitute for force.

may be decided by others who are not interested; and in which measures may be taken to compel the parties to accept peace on equitable terms."<sup>1</sup>

Unfortunately, the expounder, if not the creator of international law, did not live to see the Peace of Westphalia, which put an end to the horrors and barbarities which he deplored, for he died in 1645, but the treaty was the first fruit of the new doctrine which, after regulating warfare, will eventually establish peace as the normal and only durable state of things.

The various treaties bearing the name of Utrecht (1713-1714) were negotiated at the conclusion of war by the parties in conflict. They were in the nature of a statute, but their provisions of a special and political nature need not detain us. These provisions were, however, only less fundamental than those of Westphalia and offer a valuable precedent for an international conference. Again to quote Wheaton:

The treaties of Utrecht were constantly renewed and confirmed from this time forth in every successive treaty of peace between the great continental and maritime powers until the peace of Luneville, 1800, and that of Amiens, 1803, when they were for the first time omitted. The only material alteration, during all this period, in the territorial arrangements stipulated by this great compact was that provided by the treaty of Vienna, 1738, which transferred the crown of the two Sicilies to a branch of the house of Bourbon. In other respects the territorial arrangements of the south of Europe continued to rest until the French revolution, and still continue to rest upon the basis of the peace of Utrecht.<sup>1</sup>

<sup>1</sup> Grotius. *De Jure Belli ac Pacis*, Book II, ch. 23, sec. VIII, Art. 4.

<sup>2</sup> Henry Wheaton's *History of the Law of Nations*, pp. 87-88. The Peace of Utrecht consists of separate treaties made by France with Great Britain, Portugal, Prussia, Savoy and Holland (April 11, 1713); and by Spain with Great Britain (July 13); and with Savoy (April 13), which were followed by treaties of Spain with Holland (June 26, 1714), and with Portugal (February 6, 1715), signed at the same place. The treaty of Rastadt (March 6, 1714) made by the emperor, for himself and the Empire, with France, was modified slightly and finished at Baden in Switzerland, September 7, 1714. (Woolsey's *International Law*, 6th ed. p. 435.)

The reader is referred to Appendix II in Woolsey's *International Law* for the provisions of the chief treaties from 1526 to the Congress of Berlin (1878).

Several general stipulations, however, have outlived wars and the rumors of wars, for Great Britain and France on the one hand, and France and Holland on the other, agreed that ships of each shall be free to carry goods not contraband and persons not military pertaining to the enemies of the other. To quote the exact language:

The ship itself, as well as the other goods found therein, are to be esteemed free, neither may they be detained on pretense of their being, as it were, infected by the prohibited goods, much less shall they be confiscated as lawful prize.

And again, in the treaty between Great Britain and France, the liberty granted to goods on a free or neutral ship

shall be extended to persons sailing on the same, in such wise that, though they be enemies of one or both parties, they shall not be taken from the free ship, unless they be military persons, actually in the service of the enemy.

Free ships do indeed make free goods, and the principle re-enunciated in the Treaty of Utrecht has made its way into the law of the world.<sup>1</sup>

Passing over the various conferences held and the treaties concluded in the eighteenth century, we come to the Congress of Vienna (1814-1815), which attempted, by a rigid and thorough application of the principle of legitimacy, to reconstruct Europe upon permanent lines, after the crash of the French Revolution and the downfall of Napoleon.

In a separate and secret article of the Treaty of Paris of 1814, the allied powers reserved to themselves the disposal of the territories renounced by France in the open treaty, as well as the relations tending to produce a system of real and durable equilibrium. The wit and ingenuity of Talleyrand made the outcast a power in the Congress which, opening

<sup>1</sup> It should be said that another clause of the treaty between Great Britain and France (Article XIII) has survived to the present day, and been the measure of the right of France to participate in the Newfoundland fisheries, until by an agreement concluded on April 8, 1904, France renounced the privileges established to her advantage by Article XIII of the Treaty of Utrecht, and confirmed or modified by subsequent provisions.



at Vienna, on November 1, 1814, closed its deliberations on June 11, 1815. Eight powers were represented: Great Britain, Russia, Austria, Prussia, France, Spain, Portugal and Sweden. It was, in effect, a conference of dictators and required the smaller powers to submit to their decrees without a share in their deliberations. In other words, the great powers agreed among themselves and legislated for the rest of Europe. The work, therefore, was largely political, but as all were concerned, all were regarded as present or bound by the determinations of the Congress. It was preëminently a war conference, but it established peace—a peace which lasted for many years. Its deliberations took the form of a general statute. It neutralized Switzerland; it proclaimed the free navigation of international rivers; it regulated the rank of diplomatic agents, and decreed the abolition of the slave trade.<sup>1</sup>

From our point of view the value of the Congress of Vienna lies not in what it actually did but in the precedent it furnishes for subsequent congresses and is only less important than the Congress of Westphalia. No one has expressed this idea more clearly than the distinguished publicist Sir Travers Twiss, from whom I quote the following passages:

The Congress of Vienna inaugurated a new era in the history of European public law, in proclaiming the principle that the states of Europe owe to the community of nations duties to which their special interests must be subordinated. From the Congress of Westphalia to the Congress of Vienna, special interests had the upper hand and the cardinal principle of public law was the *absolute respect* of the sovereignty of the individual states.

<sup>1</sup> The provisions of a general nature are thus summarized by a recent and competent authority, Dr. Oppenheim: "The Final Act of the Vienna Congress . . . comprises law-making stipulations of world-wide importance concerning four points—namely, first, the perpetual neutralization of Switzerland (Article 118, No. 11); secondly, free navigation on so-called international rivers (Articles 108–117); thirdly, the abolition of the negro slave trade (Article 118, No. 15); fourthly, the different classes of diplomatic envoys (Article 118, No. 16)." (International Law, Vol. I, Peace, sec. 556).

The regulations concerning diplomatic agents as modified by the Congress of Aix-la-Chapelle—everywhere recognized and adopted—form Article 18 of the instructions to diplomatic officers of the United States, p. 8.

Napoleon I trampled under foot the international law of his epoch, but upon the ruins of the old system there arose a consciousness of the community of interests which has called into being the consciousness of a community of duties. This consciousness has contributed powerfully to the establishment of a new order of affairs whose highest expression is the European Congress. The reunions of representatives of independent states with the mission to settle doubtful points of public law have limited the liberty of individual states, by regulating their reciprocal relations in the interest of the community; nevertheless these reunions marked a real progress in the interest of the individual states by recognizing their right to share upon a footing of equality the benefits of a common jurisprudence.<sup>1</sup>

<sup>1</sup> Sir Travers Twiss, on the Congress of Vienna and the Conference of Berlin (1884-1885) *Revue de Droit International et de Législation Comparée*, Vol. XVII, p. 201.

The change noticeable in international relations in the past century has been indicated by Professor Joseph H. Beale, Jr., in the following brief and pointed passages:

"The most striking development of the law of nations during the last century has been in the direction of international constitutional law, if I may so call it, rather than of the substantive private law of nations. At the beginning of the period the fundamental doctrine of international law was the equality of all states great or small, and this idea, as one might expect, was fully recognized and insisted on during the first fifty years of the century. There was little development in the law otherwise. Each nation adopted and enforced its own idea of national rights, and was powerless to force its ideas upon other nations.

"In the last half of the century, however, there has been an enormous development of combinations, both to affect and to enforce law; and resulting therefrom a development of the substance of the law itself. The associations of civilized nations to suppress the slave trade both made and enforced a new law. The concert on the Eastern question, the Congress of Paris, the joint action of the Powers in the case of Greece and Crete, and in the settlement of the questions raised by the Russo-Turkish and Japanese wars, the Geneva and the Hague conventions, are all proofs of the increasing readiness of the Great Powers to make, declare, and enforce doctrines of law; and they have not hesitated, in case of need, to make their action binding upon weaker states, disregarding, for the good of the world, the technical theory of the equality of all states. While all independent states are still free, they are not now regarded as free to become a nuisance to the world."

Address delivered before the Congress of Arts and Sciences Universal Exposition, St. Louis, September 20, 1904, printed in the proceedings of the Congress of Arts and Sciences, Vol. VII, pp. 473-474. Reprinted in XVIII, *Harvard Law Review*, pp. 274-275.

The political regulations of the Congress were temporary in their nature, not of universal interest or concern. The former passed away with the causes to which they owed their origin; the few universal provisions have lasted, and show by their survival that only matters of universal interest outlive a conference. But the fact that they do outlive a conference, is a reason why conferences should meet and discuss questions of universal and permanent interest and importance. Criticise the Congress of Vienna as we may, for it was based upon self-interest and greed, its work was not only of fundamental importance, but pointed the way to a better and brighter day.

The next great conference, whose conclusions can be said to possess legislative value, was the Congress of Paris, held in 1856, at the conclusion of the Crimean War. It was therefore, as its many predecessors, a war conference, but it is memorable in the annals of international law for the fact that it seriously and consciously began the codification of international law. It was natural that its work should concern the laws of war, because war was the reason for its assembling, but having concluded peace and regulated the special interests of the parties in interest the conference took up broad questions of general and universal interest. The solution which it gave was satisfactory at the time and is widely, if not universally, recognized as an integral part of public international law.

1. Privateering is, and remains abolished.
2. The neutral flag covers enemy's goods, with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.
4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The Congress of Paris did not, however, merely begin seriously the codification of international law and furnish an admirable specimen, albeit within narrow limits, but it voiced in no uncertain terms the sentiment of enlightened progress when, in Article VIII of the general treaty, it declared for mediation of the contracting powers, in order to prevent a

recourse to force, should a controversy arise which threatened their peaceful relations.

Although it can not be denied that the Congress of Berlin of 1878, like its predecessor the Congress of Paris, was a war conference, it is nevertheless true that its work was not wholly confined to the issues of war, and while its meeting was due to the Russo-Turkish War and dissatisfaction with the Treaty of San Stefano, concluded between the belligerents, its deliberations were as broad as the interests directly or indirectly causing the war. It was in this sense a war congress, but in addition to concluding a peace between the belligerents, the Congress dealt particularly and largely with the Balkan Peninsula, and set up the state of affairs which, while changed in part, is nevertheless the basis of order in eastern Europe. Convoled by war, it sought, by establishing a firm peace, to remove the causes of war, and its assembling, as well as the success of its work, gave an impetus to international conferences. Such are in brief the classic examples of the War Congress.

### 3. CONFERENCES IN PEACE FOR REGULATION OF WAR

But alongside of these larger gatherings there were smaller meetings that have profoundly influenced the future, and from the many, four may be selected for purposes of illustration. The conferences referred to are the first Geneva Convention of 1864, the later Geneva Convention of 1868, the St. Petersburg Conference of 1868, and the Brussels Conference of 1874. Differing widely in their origin and nature, these conferences have one important point in common, namely, that they were not immediately preceded by a war, and that they were not assembled in order to adjust the terms of peace. They were, however, war conferences in the sense that they dealt exclusively with questions arising in war, and in the further sense that the results of their deliberations were meant to regulate, and actually have regulated, the conduct of future warfare. They all met in a time of peace, in response to an urgent and enlightened public opinion, and they thus furnished precedents for the first Peace Conference of 1899 in that they



showed not merely the possibility, but the feasibility, of general conferences meeting in times of peace. Had the first conference dealt solely with the matter of armament, as proposed in the first call, and adopted rules and regulations dealing solely with the question of armaments, the Conferences of Geneva of 1864 and 1868, the Conference of St. Petersburg and the Conference of Brussels of 1874 would have been not merely forerunners, but parallels. The second rescript, by enlarging the scope of the Conference, so as to consider the means by which wars may be prevented, differentiated the First Peace Conference from its predecessors, and made it in fact as well as in theory a peace conference. But to return to the subject more immediately at hand.

The former theory and practice of nations was that war is a relation, not merely between State and State, but between the individual citizens of contending States, who, by the declaration of war, became enemies, and subject to be treated as such. Enlightened practice draws a distinction between enemies, by dividing them into two categories, combatants and non-combatants, permitting the use of force against the combatant, even to the point of taking his life. The non-combatant, while still regarded as in a certain sense an enemy, is not actively such, and a sick or wounded combatant should not be treated in the same manner as a combatant. He can do no harm; therefore, he is harmless. Humanity not only requires that he should not be injured: it insists that he be protected and furnished the medical attendance necessary and proper to restore him to health.

The horrors of the Crimean War, due in large part to a lack of adequate medical equipment, the Franco-Austrian War of 1859, especially the battle of Solferino, in which thousands of wounded died for lack of care, caused a friend of humanity, Henri Dunant, to publish, in the year 1862, a brochure, entitled *Un Souvenir de Solférino*, in which he gave a heartrending description of the sufferings of the wounded, either abandoned or improperly treated, and showed that the quickest and best remedy for inadequate official service was to permit the organi-

zation of voluntary associations for the care of the sick and wounded. The pamphlet had an enormous circulation. The Geneva Society of Public Utility, under the presidency of Mr. Gustave Moynier, a name always to be mentioned with respect, took up the project, and as a result of the combined efforts of M. Dunant and the Geneva Society, an international conference was held at Geneva, in 1863, composed of representatives of a great number of States, of delegates from charitable societies, and friends of humanity. Without going into details, it is sufficient for the present purpose to state that this conference, wholly unofficial and due to private initiative, influenced the Swiss Government to invite an official conference to be held at Geneva in the coming year, with the result that the celebrated Red Cross Convention was adopted and signed at Geneva on August 22, 1864, by which the moral duty to protect the sick and wounded was transformed into an international and legal obligation. The horrors of the Crimea and of the Italian campaign gave rise to this first convention. The naval battle of Lissa between the Austrian and Italian fleets in 1866, in which a large number of shipwrecked sailors perished for lack of adequate attendance, led in 1868 to the assembling of a second diplomatic conference at Geneva, in order to extend to maritime warfare the humanitarian provisions of the First Geneva Convention. The result of the labors of this second conference, likewise due to the initiative of Switzerland, is known to the world as the project of additional articles signed and dated October 20, 1868. It will be noted that these conferences were due, in the first place to the individual and private initiative of M. Dunant and M. Moynier, and that a progressive country, in response to public opinion, issued the call.

If humanity demanded that the sick and wounded be properly cared for, humanity likewise insisted that science should not improperly and needlessly injure and wound the victim of war. The purpose of war is not to kill but to disable the combatant, and while the weapon must be effective, it should not be needlessly destructive. Destructiveness is a means, not

an end in itself. The wars of 1864 and 1866 were decisive and bloody; the proposed introduction of newly invented explosives and the fear of their consequences led an enlightened Czar of Russia, Alexander II, to call a conference at St. Petersburg to consider whether the means of warfare might not be humanized, and the use of certain instruments be prohibited such as projectiles of a certain weight and of an explosive quality.<sup>1</sup> The conference was preceded by but was not summoned to end any particular war, and the Declaration of St. Petersburg—the result of its labors—contemplates the existence of war. The underlying spirit of the Declaration is, however, so clearly humanitarian and universal in its aim, and the declaration itself shows so conclusively the possibilities of enlightened international legislation that its material parts deserve quotation:

Considering that the progress of civilization should have the effect of alleviating, as much as possible the calamities of war:

That the only legitimate object which states should endeavor to accomplish during war is to weaken the military force of the enemy;

That for this purpose, it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of

<sup>1</sup>In 1863 a bullet was introduced into the Russian army, to be used for blowing up ammunition wagons, which exploded, by means of a cap, on contact with a hard substance. The fear that this sort of bullet might be employed against troops was increased when, in 1867, a modification of it was suggested which enabled it to explode, without a cap, on contact even with a soft substance. The Russian War Minister, General Milutine, was reluctant, therefore, to sanction the use of the bullet, as thus modified, and induced his Government to issue a circular to the Powers, inviting them to send delegates to an International Military Commission, for the consideration of the question which had arisen. The Prussian Government was disposed to enlarge the scope of the inquiry, so as to enable it to deal generally with the application of scientific discoveries to warfare. To this Great Britain was opposed, and her view was found to be shared by the other Powers when the delegates met at St. Petersburg on October 29 (November 9), 1868. They agreed upon a Declaration, prohibiting the employment of the bullets in question, on November 4 (16), and it was signed on behalf of the seventeen Powers concerned by their diplomatic representatives at the Russian Court, as Plenipotentiaries, on November 29 (December 11). Brazil subsequently acceded to it.—Holland's *Laws of War on Land*, 1908, p. 78.



arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity;

The contracting parties engage, mutually, to renounce, in case of war among themselves, the employment, by their military or naval forces, of any projectile of less weight than four hundred grammes, which is explosive, or is charged with fulminating or inflammable substances.

The Conference of Brussels of 1874, to which reference has already been made, likewise assembled at the call of the Russian Czar, Alexander II, but as in the case of the Geneva Convention, the initiative was unofficial. A French society for the amelioration of the condition of prisoners of war had elaborated a project and called an international conference to meet at Paris on May 4, 1874, in order to discuss the question. But in the month of April, the society was informed by Prince Orow that the Russian Government was considering a project on a broader and more general scale,

embracing the facts incident to a state of war, and designed to fix the rules which, adopted by common accord of civilized states, would serve to diminish, as far as possible, the calamities of international conflicts in rendering more clear and certain the rights and duties of governments and of arms in times of war.

The association was therefore invited to adjourn to a more distant date the proposed conference. The conference thus summoned by the Russian Government consisted of representatives of fifteen European states, and remained in session at Brussels from July 27, to August 27, 1874. The conference drafted a project of an international declaration concerning the laws and customs of war, the result of careful and prolonged discussion, which marks in many particulars a great advance.<sup>1</sup> The British representatives refused to consider the question of naval warfare, and the conference therefore confined itself to warfare on land. The conference was in reality a deliberative assembly, whose members were assembled

<sup>1</sup> See report of Sir A. Horsford, the British delegate, in Lorimer's *Institutes of the Law of Nations*, Vol. II, Appendix II, pp. 337-402.

to consider the various questions submitted for discussion. The representatives were not authorized to conclude agreements binding their governments, nor did the governments themselves ratify the declaration. It remained in the form of a project until twenty-five years later when it was in a modified, improved and enlarged form, incorporated into the convention on the laws and customs of war, adopted by the Hague Conference. It is thus apparent that the Conference at Brussels was in no slight sense a forerunner of the First Peace Conference, which, in one respect at least, so far considered itself as a successor, that it took up and completed the project outlined at Brussels in 1874, just as the Peace Conferences of 1899 and 1907 adapted the Additional Articles of the Geneva Convention to the changed conditions of 1907. Convoled in a time of peace, the Brussels Conference was, however, a war conference, in that its call was due to the hardships and suffering of the then recent Franco-Prussian War.

The four conferences mentioned were, therefore, precedents for the Hague Conference, and it is not without interest to note that each one of the various projects adopted by these conferences was discussed at the First Conference; that two of them, namely, the Additional Articles of 1868, and the Brussels project, were revised and enlarged in the light of experience, and adopted in the form of international conventions by the First Hague Peace Conference. It is also interesting to note that two of these four conferences were called by one and the same enlightened Czar of Russia, so that we have not merely international but personal precedent.

#### 4. PEACE CONFERENCES

Two conferences of Europe and America should be mentioned in passing as furnishing precedents for the First Hague Conference because each met in a time of profound peace and each was neither preceded by nor followed by war, and the mission of each was to prevent war, the one by removing possible causes, the other by providing a substitute in many cases.

The first is the Congress for the regulation of the Congo, which met at Berlin upon the formal invitation of Germany, November 15, 1884, and completed its labors on February 26, 1885. Of the value of this Congress, a recent writer—to whose chapter on important law-making treaties the student is referred—says:

The General Act of the Congo Conference of Berlin of February 26, 1885, . . . is a law-making treaty of great importance, stipulating: freedom of commerce within the basin of the river Congo for all nations; prohibition of slave-transport within that basin; neutralization of Congo Territories; freedom of navigation on the rivers Congo and Niger for merchantmen of all nations; and, lastly, the obligation of the signatory Powers to notify one another all future occupations on the coast of the African continent.<sup>1</sup>

The American precedent is the Pan-American Conference, which met in Washington, October 2, 1889, and adjourned April 19, 1890, and in which eighteen American States were represented.

In the circular letter of Secretary Blaine, dated November 29, 1881, the conference was to meet at Washington, November 24, 1882, for the purpose of considering and discussing the methods of preventing war between the nations of America.

He [the president] desires that the attention of the Congress shall be strictly confined to this one great object; that its sole aim shall be to seek a way of permanently averting the horrors of cruel and bloody combat between countries, oftenest of one blood and speech, or the even worse calamity of internal commotion and civil strife; that it shall regard the burdensome and far-reaching consequences of such struggles, the legacies of exhausted finances, of oppressive debt, of onerous taxation, of ruined cities, of paralyzed industries, of devastated fields, of ruthless conscription, of the slaughter of men, of the grief of the widow and the orphan, of embittered resentments, that long survive those who provoked them and heavily afflict the innocent generations that come after.<sup>2</sup>

<sup>1</sup> Dr. Oppenheim's *International Law*, Vol. I, Peace (1905), Chapter III, pp. 563-568.

<sup>2</sup> For the text of this remarkable document, see Appendix, pp. 751-754.

The meeting of the congress did not take place until 1889. Commenting upon the Congress, Mr. John Bassett Moore says, in his *International Law Digest*:

Of this conference one of the results was the celebrated plan of arbitration adopted April 18, 1890. By this plan it was declared that arbitration, as a means of settling disputes between American republics, was adopted "as a principle of American international law;" that arbitration should be obligatory in all controversies concerning diplomatic and consular privileges, boundaries, territories, indemnities, the right of navigation and the validity, construction, and enforcement of treaties; and that it should be equally obligatory in all other cases, whatever might be their origin, nature, or object, with the sole exception of those which, in the judgment of one of the nations involved in the controversy, might imperil its independence; but that, even in this case, while arbitration for that nation should be optional, it would be "obligatory upon the adversary power."<sup>1</sup>

The modern world was thus familiar with the conference at the end of war; with the conference called in time of peace to humanize and regulate future war; and with the conference meeting in time of peace to prevent war by eliminating its probable causes as well as with the conference assembling "for the purpose of considering and discussing methods of preventing war" by a substitute for war, namely international arbitration.

The initiative of individual and enlightened sovereigns had blazed the trail; public opinion of the community of nations now forces the hand of sovereign and statesman.

## 5. CREATION OF PUBLIC OPINION FOR THE CONFERENCE

Instances are indeed rare in which a sovereign, of his own will, and without an impelling force, takes his people into counsel, and shares with them the government of the country entrusted to his care. Public opinion, expressed through a longer or shorter period of time, has resulted in a readjustment of the relations between the governor and the governed, and the participation of citizens and subjects in the government of their respective countries is nothing but a surrender

<sup>1</sup> Moore's *International Law Digest*, Vol. VII, pp. 70-71.



to public opinion. Conferences called by sovereigns, whatever they may have been in earlier times, when the declaration of war and the conclusion of hostilities were preëminently subjects for the sovereign to decide, and therefore about which sovereigns might well confer, are called at the present day, and have been for some time past, in response to an enlightened international opinion, so strong in volume and unmistakable in terms that it can not be neglected with impunity. This public opinion, however strong and irresistible it may be, is the result of gradual, and indeed imperceptible, growth, but it exists and is certain to control the future, as it has dominated the immediate past.

Statesmen, clergymen, philosophers, jurists, and dreamers of dreams, without a calling or a profession, had urged upon an unwilling and unappreciative world the holding of international conferences. "The great design" of Henry IV and his minister, Sully, outlined a permanent conference in which matters of international importance might be discussed, and peace, albeit an armed peace, maintained. The *Nouveau Cynée*, published by Éméric Crucé, proposing a general conference and arbitration of international differences, preceded by two years the milder and less specific recommendations of Grotius. The gentle Penn, in 1693, published an *Essay Towards the Present and Future Peace of Europe*, by the establishment of an European Diet, Parliament, or Estates, moved thereto, as he says, by the project of Henry IV. In the eighteenth century, the Abbé de Saint-Pierre and Jean Jacques Rousseau published their projects for perpetual peace, based upon a permanent and perpetual union, with a perpetual congress or senate in which the sovereigns should be represented by deputies. The philosopher Kant proposed Confederation of States, a permanent congress and the ultimate abolition of standing armies; the jurist Bentham not only proposed the limitation of armaments, but a congress or international court of justice for the settlement of international disputes. These various projects, however, made but a limited appeal. They may have convinced the reason of the select few, but they

had made no impression upon the public at large. The contributions of William Ladd, James Lorimer and Dr. Bluntschli, belong to the nineteenth century. The work of Ladd deserves examination and consideration by reason of its prophecy of a conference and may not be dismissed with a mere mention.

Mr. Ladd's plan for the establishment of a Congress and a Court of Nations is found in his *Essay on A Congress of Nations*, published in Boston in the year 1840, and it is not too much to say that this little book contains within its covers and within singularly narrow compass not merely the arguments for, but the arguments against, the establishment of both institutions.

A paragraph from the introduction to this masterpiece and one from the body of the *Essay on the function of the Congress of Nations* are all that can be quoted. The plan consisted of two parts:

1. A congress of ambassadors from all those Christian and civilized nations who should choose to send them, for the purpose of settling the principles of international law by compact and agreement, of the nature of a mutual treaty, and also of devising and promoting plans for the preservation of peace, and meliorating the condition of man.<sup>1</sup>

In the following passage Mr. Ladd outlines at once the policy of his Congress and the actual program of the Hague Conferences:

The Congress of Nations is to have nothing to do with the internal affairs of nations, or with insurrections, revolutions, or contending factions of people or princes, or with forms of government, but solely to concern themselves with the intercourse of nations in peace and war. 1st. To define the rights of belligerents towards each other; and endeavor, as much as possible, to abate the horrors of war, lessen its frequency, and promote its termination. 2d. To settle the rights of neutrals, and thus abate the evils which war inflicts on those nations that are desirous of remaining in peace. 3d. To agree on measures of utility to mankind in a state of peace; and 4th, to organize a Court of Nations. These are the four great divisions of the labors of the proposed Congress of Nations.<sup>2</sup>

<sup>1</sup> Ladd's *Essay on A Congress of Nations*, p. iv.

<sup>2</sup> *Ibid.*, p. 16.

The resemblance between Ladd's project and the Hague Conferences is so patent as to need no comment, and while it would be an exaggeration to insist that the Conference is the direct result of Ladd's Essay, it would be unfair not to state that Ladd's project became widely known in America, where public opinion was created in its behalf; that it was published in England, and influenced the peace movement along Ladd's lines, and that the project for the establishment of a Congress and a Court of Nations was, by the faithful disciple, Elihu Burritt, laid before the various Peace Conferences of Brussels (1848), Paris (1849), Frankfort (1850), and London (1851).

It is perhaps not too much to say that had not the Crimean War broken out in the fifties, the experiment of a conference would have been tried and a permanent court established long before the present generation.

As it is important to show the steps by which Ladd's project became known, I shall quote some further passages from the Essay before closing with a statement from Elihu Burritt, which would seem to be proof positive of the influence of Ladd upon the creation of the means whereby international peace is to be secured and safeguarded.

In commenting upon Saint Pierre's scheme, Cardinal Fleury pleasantly told the author that

he had forgotten one preliminary article, which was the delegation of missionaries to dispose the hearts of the princes of Europe to submit to such a diet. <sup>1</sup>

To which Ladd adds:

The peace societies must furnish these missionaries, and send them to the princes in monarchical governments, and to the people in mixed and republican governments. Let public opinion be on our side, and missionaries will not be wanting.<sup>1</sup>

And again:

Before either the President or the Congress of these United States will act on this subject, the sovereign people must act, and before they will act, they must be acted on by the friends

<sup>1</sup> Ladd's Essay on A Congress of Nations, pp. 75-76.



of peace; and the subject must be laid before the people, in all parts of our country, as much as it has been in Massachusetts, where there has, probably, been as much said and done on the subject, as in all the other twenty-five states of the Union. When the whole country shall understand the subject as well as the state of Massachusetts, the Congress of the United States will be as favorable to a Congress of Nations as the General Court of Massachusetts; and when the American government shall take up the subject in earnest, it will begin to be studied and understood by the enlightened nations of Europe.<sup>1</sup>

Mr. Ladd devoted the last years of his life to popularizing the doctrines of his Essay, and distributed copies of it to

"the crowned heads and leading men of Christendom," as Mr. Burritt says, "with all the glowing zeal and activity which he brought to the cause. And it is the best tribute to his clear judicious mind that the main proposition as he developed it has been pressed upon the consideration of the public mind of Christendom ever since his day, without amendment, addition, or subtraction."<sup>2</sup>

Mr. Ladd cherished no illusions. He believed that his plan was practical, and believing, likewise, that it was wise and just, he felt that it could wait years, if need be, for its realization, and that repeated failures would not prevent ultimate triumph. For example, after describing the attempts to form a Congress of Nations, he says:

The inference to be deduced . . . is, that the governments of Christendom are willing to send delegates to any such Congress, whenever it shall be called *by a respectable state*, well established in its own government, if called in a time of peace, to meet at a proper place. That this attempt at a Congress of Nations, or even a dozen more, should prove abortive on account of defects in their machinery or materials, ought not to discourage us, any more than the dozen incipient attempts at a steamboat, which proved abortive for similar reasons, should have discouraged Fulton. Every failure throws new light on this subject, which is founded in the principles of truth and equity. Some monarch, president, or statesman—some moral Fulton, as great in ethics as he was in physics—will yet arise, and complete this great moral machine, so as to make it practically useful, but improvable by coming generations. Be-

<sup>1</sup> Ladd's Essay on A Congress of Nations, p. 88.

<sup>2</sup> Hemenway's Life of William Ladd, p. 15.

fore the fame of such a man, your Cæsars, Alexanders, and Napoleons will hide their diminished heads, as the twinkling stars of night fade away before the glory of the full-orbed king of day.<sup>1</sup>

When the Conference called by the "respectable state," namely, Russia, shall have become permanent and assemble periodically to correct the inequalities and deficiencies of the law of nations, and when a court of nations composed of judges exists as a permanent institution before which nations appear as suitors, and when mankind, accustomed to these institutions, recognizes their importance, the name of William Ladd will undoubtedly figure among the benefactors of his kind.

The establishment of peace societies in the United States, Great Britain, and later, upon the continent; the delivery of addresses, and the circulation of pamphlets devoted to the cause, familiarized the public with the aims and purposes of the societies; the holding of the great peace Conferences organized by enthusiasts, and presided over by publicists, literateurs, and scientists, such as the great Conferences of Brussels (1848), of Paris (1849), under the presidency of Victor Hugo; of Frankfort (1850); and of London (1851), under the presidency of Sir David Brewster, to all of which were presented the project for a congress of nations for the codification of international law and a court of nations for its interpretation; the organization of the Interparliamentary Union in 1889, with its annual reunions since that date; the establishment of the Institute of International Law (1873) for the discussion of international law and its codification; together with the publication of the *Revue de Droit International et de Législation Comparée* (1869) and the *Annuaire de l'Institut* as organs for the movement, as well as the organization of the International Law Association for the Reform and Codification of the Law of Nations (1873) furnish examples of international conferences and reunions in which grave and important matters

<sup>1</sup> Ladd's *Essay on A Congress of Nations*, p. 70.

could be discussed, and conclusions reached, and the activity of learned and scientific societies, shows the possibility of a codification of international law in the light of theory and practice. The repeated discussion of arbitration in legislative assemblies; the success of arbitration in the actual settlement of international difficulties; the suggestion of disarmament or a limitation of armament, made by men like Bentham,<sup>1</sup> Sir Robert Peel<sup>2</sup> and Richard Cobden in England, by Charles Sumner in the United States,<sup>3</sup> and prophesied by John Bright

<sup>1</sup> How then shall we concentrate the approbation of the people, and obviate their prejudices?

One main object of the plan is to effectuate a reduction, and that a mighty one, in the contributions of the people. The amount of the reduction for each nation should be stipulated in the treaty; and even previous to the signature of it, laws for the purpose might be prepared in each nation, and presented to every other, ready to be enacted, as soon as the treaty should be ratified in each state.

By these means the mass of the people, the part most exposed to be led away by prejudices, would not be sooner apprised of the measure, than they would feel the relief it brought them. They would see it was for their advantage it was calculated, and that it could not be calculated for any other purpose.—Bentham's Plan for a Universal and Perpetual Peace, 1789. Bowring's Edition of Bentham's Works, Vol. II, p. 553.

<sup>2</sup> "Is not the time come," said Sir Robert "when the powerful countries of Europe should reduce those military armaments which they have so sedulously raised? What is the advantage of one Power greatly increasing its army and navy? Does it not see that if it possesses such increase for self-protection and defense, the other Powers will follow its example? The consequence of this state of things must be that no increase of relative strength will accrue to any one Power, but there must be a universal consumption of the resources of every country in military preparation. The true interest of Europe is to come to some common accord, so as to enable every country to reduce those military armaments which belong to a state of war, rather than of peace. I do wish that the councils of every country, or if the councils will not, that the public mind and voice would willingly propagate such a doctrine."—Lorimer's Institutes of the Law of Nations, Vol. II, Chap. IX, p. 246.

And see Chap. IX of the second volume of Lorimer's excellent work dealing with the question of proportional disarmament, to which the reader's attention is called.

<sup>3</sup> Charles Sumner, from the beginning to the end of his public career, devoted himself to the question of disarmament, the establishment of a Congress of Nations, and the abolition of war by means of an international court of justice. Reference is made to his three great addresses: The

in a notable speech in Parliament; the growing sense of the uselessness of war, and the burden of an armed peace, showed unmistakably that an enlightened international public opinion would respond to a call for an international conference, which, in a time of peace, would consider the means by which war might be humanized, if not averted, and peace preserved without increasing the preparations for war. The question was not whether such a conference should meet, but who should call it.

After stating that "general and perpetual treaties might be formed, limiting the number of troops to be maintained," Bentham declared that "whatsoever nation should get the start of the other in making the proposal to reduce and fix the amount of its armed force, would crown itself with everlasting honour. The risk would be nothing—the gain certain. This gain would be, the giving an incontrovertible demonstration of its own disposition to peace, and of the opposite disposition in the other nation in case of its rejecting the proposal."<sup>1</sup>

The statesman and friend of peace, John Bright, hoped that his country might have the honor of calling the conference. In a speech delivered in the House of Commons on July 21, 1856, he outlined, in a single paragraph, the causes which have led to the proposal to limit armaments, and he suggested the means by which armaments might be reduced by international agreement. Mr. Bright said:

Success in war no longer depends on those circumstances that formerly decided it. Soldiers used to look down on trade, and machine-making was, with them, a despised craft. No

True Grandeur of Nations (1845), The War System of the Commonwealth of Nations, (1849), The Duel between France and Germany," (1870)—in which he exhausted the arguments on the subject. The second part of his masterly address on The War System enumerates and summarizes the various attempts and projects made for the establishment of a Congress of Nations. For the addresses referred to, see Sumner's Addresses on War, with an introduction by Edwin D. Mead, published by Ginn & Company, Boston, 1904.

<sup>1</sup> Bentham's plan for a universal and perpetual peace (1789), Bowring's ed. of Bentham's Works, Vol. II, p. 551.



stars or garters, no ribbons or baubles bedecked the makers and workers of machinery. But what is war becoming now? It depends, not as heretofore, on individual bravery, on the power of a man's nerves, the keenness of his eye, the strength of his body, or the power of his soul, if one may so speak; but it is a mere mechanical mode of slaughtering your fellowmen. This sort of thing can not last. It will break down by its own weight. Its costliness, its destructiveness, its savagery will break it down; and it remains but for some Government—I pray that it may be ours!—to set the great example to Europe of proposing a mutual reduction of armaments.<sup>1</sup>

The British Government, however, did not grasp the opportunity. Indeed, when, in 1863, Napoleon III proposed a conference to consider, among other things, the reduction of armament,<sup>2</sup> Great Britain refused, and the refusal of Great Britain led to the abandonment of the project. But the proposal to call a conference had been made, the subject was familiar to the public, and, as Mr. William Ladd said in his remarkable *Essay on A Congress of Nations*, which prophesied in its minutest detail the calling, the organization, and the procedure of the Hague Conference, the precedents showed clearly that a conference would meet when called by “a respectable state.” Events proved the truth of the prophecy; accident determined that Russia should be the “respectable state,” and Nicholas II the man.

What made the ruler of an autocratic nation, in which public opinion scarcely dared whisper, the mouthpiece of enlightened public sentiment? Various suggestions have been made. In opening the first conference, the Dutch Minister of Foreign Affairs attributed the calling of the Conference to the traditions of the Czar's imperial house, which statement was referred to with satisfaction in the closing presidential address of Baron

<sup>1</sup> Hansard's *Parliamentary Debates*, Third Series, Vol. 155, p. 199; Bright's *Speeches*, edited by Rogers, Vol. II, p. 413.

<sup>2</sup> Lorimer's *Institutes of the Law of Nations*, Vol. II, p. 247; *Annales du sénat et du Corps législatif*, 1864, pp. 5-7. *Archives diplomatiques*, 1863, Vol. IV, pp. 188-189; Pingaud's *Napoléon III et le désarmement*, *Revue de Paris* (May 15, 1899).

de Staal.<sup>1</sup> It has been said that the late M. de Bloch influenced the Czar against the increase of armaments and laid before his eyes the horrors of war in such a way as to induce, or to predispose the Czar to call the Conference. Again, it is pointed out that the Czar is preëminently a man of peace, and that he has more than a touch, in his make-up, of his ancestor Alexander I, who not merely dreamed of a Holy Alliance, but established one in order to maintain the peace of the world. It may be admitted that any one or all of these suggestions is correct, and that singly or collectively they sufficiently account for the action of the Czar. But the question remains, Why was the Conference called in 1898? for, if it depended solely upon the Czar, it might have been called earlier, for public opinion was ripe before the Czar was born, or might have been called later, for this same public opinion would have been as insistent in the beginning of the twentieth century as at the close of the nineteenth.

To this question no satisfactory answer has been given and the origin of this great and beneficent Conference lies hidden until he who called it cares to speak.

<sup>1</sup> F. de Martens' *Question du désarmement entre la Russie et l'Angleterre*, *Revue de droit international et de législation comparée*, 1894, Vol. XXXI, pp. 573, et seq.

See also *Actes et Documents relatifs au programme de la Conférence de la Paix, 1899*, Section A, for expressions of statesmen and publicists about disarmament.

## CHAPTER II

### GENERAL SURVEY OF THE FIRST PEACE CONFERENCE

#### 1. NATURE AND PURPOSE OF A CONFERENCE

It has been previously stated that the development of common law is accelerated by statute and that the common law of nations, composed of usage and custom, recognized and applied as law, has been developed and accelerated by analogy with the common law by means of treaties, compacts of interested powers, and finally by international conferences. An attempt was made to show that conferences in the past usually met at the close of war to adjust its immediate causes and to lay foundations for future and permanent peace; that in recent years general stipulations at conferences had become more frequent; that in very recent periods conferences had met without the mission to conclude, but to preserve, peace, or to regulate and ameliorate warfare, such as the Geneva Conventions of 1864 and 1868, St. Petersburg Convention of 1868, the Brussels Conference of 1874; that unofficial congresses, private bodies, and learned societies, as well as individual writers of authority had forwarded the movement and shown the possibilities of conferences called for the purpose of discussing and regulating, during the existence of peace, questions of grave international concern, so that differences of practice might be reconciled or give way to uniformity, and that the law of nations be codified by international agreement.

It must not, however, be forgotten that great—indeed radical and essential—differences exist between a parliament and a diplomatic assembly. A parliament legislates for a nation, and by means of proper representatives, it legislates for the various component parts of the nation. International



conferences in which the nations of the world are represented, *recommend* to the nations represented, or legislate for them *ad referendum*. A parliament presupposes subordination; a conference equality. A parliament binds the dependent; a conference recommends to the equal and independent nations. Differing in their origin and in their results, their procedure must likewise differ. The parliament, by means of majorities, decrees or issues a law; the conference, by means of unanimous agreement, presents to the nations represented a draft which, when ratified by the nations, becomes by the approval of the internal and the constitutional organs, the law of the ratifying nation. When ratified by the nations as a whole, it becomes *jus inter gentes*, that is, international law in the strict sense of the word.

Gradually and unconsciously, perhaps, we have left the customary development of international law and we resort to the international statute just as we enact the legislative statute in order to modify or develop the common or municipal law.

An international conference is, therefore, an assembly composed of representatives of the States accepting and applying in their intercourse the principles of international law, and in this assembly each nation represented is considered a unit and votes as a unit, although its delegates may be many or few. While it is, in one sense of the word, a deliberative body, it is not a parliament. Majorities show undoubtedly the trend of international feeling; but, each nation, being independent and charged with the preservation of its own existence, must judge for itself whether the conclusion of the majority is advantageous or detrimental either to its existence or legitimate interests. The majority may give pause and cause a State in the minority to reconsider its position in order to see whether what the many desire is not also desirable for the few. Majorities, therefore, exist, but they exercise a moral influence; they do not coerce. At most the decree or resolution of a majority binds the majority; it does not, and, under existing conditions, it can not well control an individual State.

A conference, then, is a diplomatic assembly, and the members of the conference represent diplomatically their respective nations. It is the nation that speaks, not the individual, who expresses an opinion, albeit this individual, by reason of his experience and ability, as well as the confidence which his character inspires, may exert a great personal influence not only in the deliberations but in the conclusions ultimately reached.

As international law is based upon the legal equality of States, it necessarily follows that each State has an equal vote. But while States are, legally speaking, equal, we know that in the world of affairs they do not possess equal influence. It is an axiom that men are created equal, but we interpret this equality, and properly, as an equality of legal right, as equality before the law. We do not mean that there is not and can not be a difference in the individual caliber and ability of the man, and just as this man develops himself and acquires influence and standing, so the nation, by husbanding its resources and making a wise use of them, acquires standing and leadership in the family of nations. While, therefore, the conference admits the equality of nations, and while each nation thus responds to the roll-call, Montenegro and Luxemburg influencing the vote as profoundly as Russia and Germany, the support of the larger nations is necessary in order to give international force and effect to a proposition before it. For example: the attitude of Great Britain in maritime law is controlling, and the view of Germany on the rights and duties of neutrals in time of war must carry great weight. In other words, equality of vote is not equality of influence.

The purpose of a conference is to reconcile divergent views, and, by conciliation and renunciation if necessary, to produce substantial agreement. This often means that progressive measures are discarded for more moderate formulas, just as the advanced guard of an army halts that the laggard may catch up; for the purpose is not to secure the assent of the few but to bind the many, and it is better to make haste slowly than by an excessive zeal to make no progress. The

result of a conference, therefore, is often strangely at variance with its program. The sweeping reforms of the enthusiast are brushed aside, and in their place tentative measures, timid measures perhaps, appear; but we must not forget that a step in advance is still a step in advance, and that the failure of today is the success of the morrow.

In order that a conference may be a success, nations should not only be willing to accept compromises and act in the spirit of compromise, but they should, in advance of the conference, decide what interests they may safely renounce in the interest of all, rather than, by a rigid attitude, endeavor to secure international recognition of national interests. The general interests of humanity exceed the interest of any one nation, however powerful, and just as society strips man of his absolute rights as an individual, so the members of the family of nations must be prepared to renounce absolute rights in the interest of international harmony. As our Secretary of State said in his instructions to the American Delegation:

In the discussions upon every question, it is important to remember that the object of the Conference is agreement, and not compulsion. If such conferences are to be made occasions for trying to force nations into positions which they consider against their interests, the Powers can not be expected to send representatives to them. It is important also that the agreements reached shall be genuine and not reluctant; otherwise they will inevitably fail to receive approval when submitted for the ratification of the Powers represented. Comparison of views and frank and considerate explanation and discussion may frequently resolve doubts, obviate difficulties, and lead to real agreement upon matters which at the outset have appeared insurmountable. It is not wise, however, to carry this process to the point of irritation. After reasonable discussion, if no agreement is reached, it is better to lay the subject aside, or refer it to some future conference in the hope that intermediate consideration may dispose of the objections. Upon some questions where an agreement by only a part of the Powers represented would in itself be useful, such an agreement may be made, but it should always be with the most unreserved recognition that the other Powers withhold their concurrence with equal propriety and right.

The immediate results of such a conference must always be limited to a small part of the field which the more sanguine

have hoped to see covered; but each successive conference will make the positions reached in the preceding conference its points of departure, and will bring to the consideration of further advances towards international agreement opinions affected by the acceptances and application of the previous agreements. Each conference will inevitably make further progress and, by successive steps, results may be accomplished which have formerly appeared impossible.<sup>1</sup>

## 2. CALLING OF THE CONFERENCE

It is difficult to determine whether the call issued for a conference to consider disarmament and assure peace was due in part to a feeling that international precedent justified the calling of such a conference, or that public opinion, fostered by advanced spirits in various parts of the world, urged it, or that, finally, the gentle and humanitarian nature of the Czar prompted him, inspired by the traditions of his imperial house, to lessen the burdens under which nations are groaning by virtue of an armed peace.<sup>2</sup> It is probable that all three reasons exercised an influence, the happy result of which was the imperial rescript dated August 12/24, 1898, handed by Count Mouravieff, Russian Minister of Foreign Affairs, to the diplomatic representatives accredited to the court of St. Petersburg:

The maintenance of general peace, and a possible reduction of the excessive armaments which weigh upon all nations, present themselves in the existing condition of the whole world, as the ideal towards which the endeavors of all Governments should be directed.

The humanitarian and magnanimous ideas of His Majesty, the Emperor, my August Master, have been won over to this view. In the conviction that this lofty aim is in conformity with the most essential interests and the legitimate views of all

<sup>1</sup> Vol. II, pp. 183-184.

<sup>2</sup> Under date of September 3, 1898, Mr. Hitchcock, ambassador to Russia, gave the Secretary of State the substance of an interview with Count Mouravieff, in which the latter is reported as stating that "His Imperial Highness and his Excellency (Count Mouravieff) are alone responsible for the invitation, which was unknown to any other government or individual previous to its issue."—*Foreign Relations*, 1898, p. 543.



Powers, the Imperial Government thinks that the present moment would be very favorable for seeking, by means of international discussion, the most effectual means of insuring to all peoples the benefits of a real and durable peace, and, above all, of putting an end to the progressive development of the present armaments.

In the course of the last twenty years the longings for a general appeasement have become especially pronounced in the consciences of civilized nations. The preservation of peace has been put forward as the object of international policy; in its name great States have concluded between themselves powerful alliances; it is the better to guarantee peace that they have developed, in proportions hitherto unprecedented, their military forces, and still continue to increase them without shrinking from any sacrifice.

All these efforts nevertheless have not yet been able to bring about the beneficent results of the desired pacification. The financial charges following an upward march strike at the public prosperity at its very source.

The intellectual and physical strength of the nations, labor and capital are for the major part diverted from their natural application, and unproductively consumed. Hundreds of millions are devoted to acquiring terrible engines of destruction, which, though today regarded as the last word of science, are destined tomorrow to lose all value in consequence of some fresh discovery in the same field.

National culture, economic progress, and the production of wealth are either paralyzed or checked in their development. Moreover, in proportion as the armaments of each Power increase so do they less and less fulfill the object which the Governments have set before themselves.

The economic crises, due in great part to the system of armaments *à l'outrance*, and the continual danger which lies in this massing of war material, are transforming the armed peace of our days into a crushing burden, which the peoples have more and more difficulty in bearing. It appears evident, then, that if this state of things were prolonged, it would inevitably lead to the very cataclysm which it is desired to avert, and the horrors of which make every thinking man shudder in advance.

To put an end to these incessant armaments and to seek the means of warding off the calamities which are threatening the whole world,—such is the supreme duty which is today imposed on all States.

Filled with this idea, His Majesty has been pleased to order me to propose to all the Governments whose representatives are accredited to the Imperial Court, the meeting of a conference which would have to occupy itself with this grave problem.

This Conference should be, by the help of God, a happy presage for the century which is about to open. It would converge in one powerful focus the efforts of all States which are sincerely seeking to make the great idea of universal peace triumph over the elements of trouble and discord.

It would, at the same time, confirm their agreement by the solemn establishment of the principles of justice and right, upon which repose the security of States and the welfare of peoples.<sup>1</sup>

We can well understand and share the views of the American ambassador in his note transmitting the Russian communication:

The high and humanitarian importance of this document can not fail to recommend it to the absorbing interest of the President and people of the United States, and the fact that Russia is the first to take a step in the direction of a general disarmament, and toward that universal peace which all Christian peoples must regard as the haven to which Christian progress ought to tend, places her in the very front rank of the civilized nations of the world, a position on which I did not hesitate to congratulate his excellency, in full confidence of the entire sympathy of our Government with the high aim to which the document gives expression.<sup>2</sup>

<sup>1</sup> Holls' Peace Conference at The Hague, pp. 8-10.

<sup>2</sup> Foreign Relations, 1898, pp. 540-541.

The following extracts from Foreign Relations of 1898, pp. 542-544, are of interest:

Count Mouravieff today gave me his conference program as follows: First, no political nor diplomatic question—past, present, or future—will be discussed; second, no secret suggestions or arrangements will be permitted, and sessions of conference to be open and public; third, present armaments not to be considered or disturbed, but if possible find way to avoid further increase; fourth, sole object exchange of ideas in furtherance of national economy and international peace in the interest of humanity as the supreme duty of governments; fifth, nothing binding on any power, but has great hopes discussions will warrant and secure appointment by conference of expert commission to further consider and formulate methods for accomplishing desired results; sixth, time and place of conference to be determined by Powers accepting invitation; seventh, he understands and appreciates position of our Government, but desires its counsel, advice, and sympathy; eighth, His Imperial Majesty and his excellency are alone responsible for the invitation, which was unknown to any other government or individual previous to its issue; ninth, English, German, French,

An analysis of this remarkable document shows that the thought uppermost in the mind of the Czar was the maintenance of general peace and with this phrase the document begins. The means proposed to produce this peace were the possible reduction of excessive armaments and, it would seem from the introductory paragraph that the ideal toward which the endeavor of all Governments should be directed was the maintenance of this general peace by a reduction of the excessive armaments which weigh upon all nations. Not only is this the ideal toward which nations should strive, but it is the supreme duty imposed upon all States; for, in a later paragraph, the purpose of the rescript is said to be "to put an end to these incessant armaments and to seek the means of ward-

Austrian, and Italian ambassadors have personally and officially expressed the sympathy of their respective governments, whose official reply to invitation will follow.

HITCHCOCK.

Telegram as to disarmament received. Though war with Spain renders it impracticable for us to consider the present reduction of our armaments, which even now are doubtless far below the measure which principal European powers would be willing to adopt, the President cordially concurs in the spirit of the proposal of His Imperial Majesty, and will send a representative to the international conference.

MOORE, *Acting*.

*Sir:* I have the honor to report having on yesterday afternoon read Mr. Moore's telegram dated the 6th instant, the receipt of which was acknowledged by my No. 143, dated the 7th instant, to the Imperial Minister of Foreign Affairs, Count Mouravieff, who requested me to convey to the President his sincere thanks and high appreciation for his cordial concurrence in the spirit of the proposal of His Imperial Majesty, as well as for his expressed intention to send a representative to the international conference.

At the request of his excellency, I left a copy of the telegram with him for repetition to wire to His Imperial Majesty the Emperor, who is now at the Crimea.

I also availed of the opportunity to read to his excellency a copy of my telegram to you dated the 3d instant, which he affirmed as an entirely correct summary of the lengthened interview I had just had with him with reference to the proposed international conference.

ETHAN A. HITCHCOCK.

For the impression produced by the publication of the Rescript see the interesting and valuable dispatch of November 9, 1898, from Mr. Herbert H. D. Pierce, *chargé d'affaires* of the United States to Russia, *Foreign Relations*, 1898, pp. 546-549.



ing off the calamities which are threatening the whole world—such is the supreme duty which is today imposed on all States.” The rescript recognized the fact patent to all observers that the world is closely knit together and that the interests of all, notwithstanding different degrees of development and local conditions, are practically and substantially the same. It further recognizes the fact, that the interest of all would be enhanced by the discussion of that which is common to all, and that, as a result of a well-nigh universal exchange of views, there might be and should be a general agreement by which the right established would be safeguarded in practice. For the rescript concludes:

It [the conference] would at the same time confirm their agreement by the solemn establishment of the principles of justice and right, upon which repose the security of States and the welfare of peoples.

An international agreement was the desideratum and in justifying the calling of the Conference direct reference was made to the classic precedents of the nineteenth century.

The intention of the Circular is precisely to provide for a full and searching investigation of this question by an international exchange of views. Certain other questions difficult of solution, but of not less moment, have already been settled in this century in a manner which has done justice to the great interests of humanity and civilization. The results which in this connection have been obtained at international conferences, particularly at the Congresses of Vienna and Paris, prove what the united endeavors of Governments can achieve when they proceed in harmony with public opinion and the needs of civilization.<sup>1</sup>

The original rescript dwelt exclusively upon the necessity of maintaining peace and suggested in no uncertain terms the reduction of armaments, if it did not propose in express terms

<sup>1</sup> From an official communication appearing in the *Journal de St. Petersburg*, September 4, 1898. Quoted from Holls' *Peace Conference at The Hague*, 1900, p. 13.

disarmament. Yet the latter would seem to be a logical consequence, for if the increase of armament is a burden, and therefore an injury, the decrease of armaments would be an advantage; the greater the decrease, the greater the advantage, and the more certain the maintenance of peace. It must have been evident to the Czar and his advisers that, however advantageous universal disarmament or its limitation might be, and however desirable a careful and thorough discussion of the subject might be, limitation of armaments could not be brought about at any one conference, and that a conference restricted to the discussion of disarmament or the reduction of armaments, while resulting in an exchange of views, would be doomed to disappointment and failure. The suggestion, however, of one means of maintaining peace does not necessarily exclude other means, and therefore in announcing the acceptance of the invitation to an international conference and the willingness to discuss the subject of armaments, the Czar took occasion, while keeping the original call of the Conference in the foreground, to enlarge the scope of the call in such a way as to include other means of attaining the general end for which public opinion seemed ripe. But in enlarging the program, the Czar felt the necessity of excluding from discussion questions which do not fall directly within the program of the amended call, and to eliminate "all questions concerning the political relations of States, and the order of things established by treaties," lest the Conference assembled for a humanitarian purpose might insensibly be transformed into a political assembly.

Therefore, on January 11, 1899/December 30, 1898, Count Mouravieff issued a second circular, which, while reaffirming the views expressed in the Imperial rescript, not only enlarged the scope of the Conference, but furnished a program for its labors:

When, in the month of August last, my August Master instructed me to propose to the Governments which have Representatives in St. Petersburg the meeting of a Conference with the object of seeking the most efficacious means for assur-

ing to all peoples the blessings of real and lasting peace, and, above all, in order to put a stop to the progressive development of the present armaments, there appeared to be no obstacle in the way of the realization, at no distant date, of his humanitarian scheme.

The cordial reception accorded by nearly all the Powers to the step taken by the Imperial Government could not fail to strengthen this expectation. While highly appreciating the sympathetic terms in which the adhesions of most of the Powers were expressed, the Imperial Cabinet has been also able to collect, with lively satisfaction, evidence of the warmest approval which has reached it, and continues to be received, from all classes of society in various parts of the globe.

Notwithstanding the strong current of opinion which exists in favor of the ideas of general pacification, the political horizon has recently undergone a decided change. Several Powers have undertaken fresh armaments, striving to increase further their military forces, and in the presence of this uncertain situation, it might be asked whether the Powers considered the present moment opportune for the international discussion of the ideas set forth in the Circular of August 12 (24, O. S.).

In the hope, however, that the elements of trouble agitating political centers will soon give place to a calmer disposition of a nature to favor the success of the proposed Conference, the Imperial Government is of opinion that it would be possible to proceed forthwith to a preliminary exchange of ideas between the Powers, with the object:

(a) Of seeking without delay means for putting a limit to the progressive increase of military and naval armaments, a question the solution of which becomes evidently more and more urgent in view of the fresh extension given to these armaments; and

(b) Of preparing the way for a discussion of the questions relating to the possibility of preventing armed conflicts by the pacific means at the disposal of international diplomacy.

In the event of the Powers considering the present moment favorable for the meeting of a Conference on these bases, it would certainly be useful for the Cabinets to come to an understanding on the subject of the program of their labors.

The subjects to be submitted for international discussion at the Conference could, in general terms, be summarized as follows:

1. An understanding not to increase for a fixed period the present effective of the armed military and naval forces, and at the same time not to increase the Budgets pertaining thereto; and a preliminary examination of the means by which a reduction might even be effected in future in the forces and Budgets above mentioned.

2. To prohibit the use in the armies and fleets of any new kind of firearms whatever, and of new explosives, or any powders more powerful than those now in use, either for rifles or cannon.

3. To restrict the use in military warfare of the formidable explosives already existing and to prohibit the throwing of projectiles or explosives of any kind from balloons or by any similar means.

4. To prohibit the use, in naval warfare, of submarine torpedo boats or plungers, or other similar engines of destruction; to give an undertaking not to construct, in the future, vessels with rams.

5. To apply to naval warfare the stipulations of the Geneva Convention of 1864, on the basis of the additional Articles of 1868.

6. To neutralize ships and boats employed in saving those overboard during or after an engagement.

7. To revise the Declaration concerning the laws and customs of war elaborated in 1874 by the Conference of Brussels, which has remained unratified to the present day.

8. To accept in principle the employment of good offices, of mediation and facultative arbitration in cases lending themselves thereto, with the object of preventing armed conflicts between nations; to come to an understanding with respect to the mode of applying these good offices, and to establish a uniform practice in using them.

It is well understood that all questions concerning the political relations of States, and the order of things established by Treaties, as in general all questions which do not directly fall within the program adopted by the Cabinets, must be absolutely excluded from the deliberations of the Conference.

In requesting you, Sir, to be good enough to apply to your Government for instructions on the subject of my present communication, I beg you at the same time to inform it that, in the interest of the great cause which my August Master has so much at heart, His Imperial Majesty considers it advisable that the Conference should not sit in the capital of one of the Great Powers, where so many political interests are centered which might, perhaps, impede the progress of a work in which all the countries of the universe are equally interested.<sup>1</sup>

The disinterestedness of the Czar is evident not merely in the call itself, for, as a great military power, Russia could not properly be accused of seeking by disarmament an advantage

<sup>1</sup> Holls' Peace Conference, pp. 24-27.



for itself, and, in the next place, the disinterestedness was likewise evident in renouncing all thought of St. Petersburg as a place of meeting for the proposed conference. The choice of The Hague was communicated to the invited governments on February 9/January 28, 1899, and on April 7, 1899, the Dutch government extended an invitation to the Powers indicated by Russia for participation in the conference:

My Government trusts that the Government will associate itself with the great humanitarian work to be entered upon under the auspices of His Majesty, the Emperor of all the Russias, and that it will be disposed to accept this invitation, and to take the necessary steps for the presence of its Representatives at The Hague on the 18th May, next, for the opening of the Conference, at which each Power, whatever may be the number of its Delegates, will have only one vote.<sup>1</sup>

It will be noted that the Powers selected in first instance were those having representatives at St. Petersburg, to which were added Luxemburg, Montenegro and Siam. It may be admitted that the principle of selection in the first place was natural. Its extension to Luxemburg, Montenegro and Siam to the exclusion of the Latin-American nations was arbitrary. As Russia has vouchsafed no official explanation of the principle of invitation and exclusion any attempted explanation will be individual and therefore conjectural. It is safe to assert, however, that exclusion did not necessarily involve disrespect.<sup>2</sup>

### 3. OPENING OF THE CONFERENCE

The opening of the Conference was fixed for the 18th day of May, a graceful tribute to the Czar, whose birthday it is. The opening ceremony was set for 2 o'clock of the after-

<sup>1</sup> Holls' Peace Conference, p. 34.

<sup>2</sup> For a list of Powers participating in the First Conference, see Final Act of First Conference, Vol. II, pp. 63-77.

It may be of interest to note that Bulgaria was represented; that its delegation sat behind Turkey. In the Second Conference Bulgaria was treated as independent in every respect.

noon in the Oranje Zaal of the House in the Woods, the summer palace of the Dutch royal family, situated about a mile from the city in the beautiful park known as the Bosch.<sup>1</sup> The Conference was called to order by M. de Beaufort, Dutch Minister of Foreign Affairs, who said in part:

In the name of Her Majesty, my August Sovereign, I have the honor to bid you welcome, and to express in this place my sentiments of profound respect and lively gratitude toward His Majesty, the Emperor of all the Russias, who, in designating The Hague as the meeting-place of the Peace Conference, has conferred a great honor upon our country. His Majesty, the Emperor of all the Russias, in taking the noble initiative which has been acclaimed throughout the entire civilized world, wishing to realize the desire expressed by one of his most illustrious predecessors—the Emperor Alexander the First—that of seeing all the sovereigns and all the nations of Europe united for the purpose of living as brethren, aiding each other according to their reciprocal needs,—inspired by these noble traditions of his august grandfather, His Majesty has proposed to all the Governments, of which the representatives are found here, the meeting of a Conference which should have the object of seeking the means of putting a limit to incessant armaments, and to prevent the calamities which menace the entire world. The day of the meeting of this Conference will, beyond doubt, be one of the days which will mark the history of the century which is about to close. It coincides with the festival which all the subjects of His Majesty celebrate as a national holiday, and in associating myself, from the bottom of my heart, with all the wishes for the well-being of this magnanimous Sovereign, I shall permit myself to become the interpreter of the wishes of the civilized world, in expressing the hope that His Majesty, seeing the results of his generous designs by the efforts of this Conference, may hereafter be able to consider this day as one of the happiest in his reign. Her Majesty, my August Sovereign, animated by the same sentiments which have inspired the Emperor of all the Russias, has chosen to put at the disposal of this Conference the most beautiful historical monument which she possesses. The room where you find yourselves today, decorated by the greatest artists of the seventeenth century, was erected by the widow of Prince Frederick Henry to the memory of her noble husband. Among the greatest of the allegorical figures which you will admire here, there is one appertaining to

<sup>1</sup>For a description of the House in the Woods, see Dr. Andrew D. White's *Autobiography*, Vol. II, pp. 256-257.



the peace of Westphalia, which merits your attention most especially. It is the one where you see Peace entering this room for the purpose of closing the Temple of Janus. I hope, gentlemen, that this beautiful allegory will be a good omen for your labors, and that, after they have been terminated, you will be able to say that Peace, which here is shown to enter this room, has gone out for the purpose of scattering its blessings over all humanity.<sup>1</sup>

His Excellency then closed his address by making two propositions; that a telegram of congratulation be sent to the Czar and that the presidency of the Conference be conferred upon M. de Staal, ambassador of Russia at the Court of St. James. Both motions were unanimously agreed to. M. de Staal thereupon assumed the presidency and addressed the Conference in part as follows:

In the quiet surroundings of The Hague—in the midst of a nation which constitutes a most significant factor of universal civilization, we have under our eyes a striking example of what may be done for the welfare of peoples by valor, patriotism and sustained energy. It is upon the historic ground of The Netherlands that the greatest problems of the political life of States have been discussed; it is here, as one may say, that the cradle of the science of International Law has stood; for centuries the important negotiations between European Powers have taken place here, and it is here that the remarkable treaty was signed which imposed a truce during the bloody contest between States. We find ourselves surrounded by great historic traditions.<sup>2</sup>

In terminating his discourse, he proposed a telegram to Her Majesty the Queen, the hostess of the Conference, and moved the election of an honorary president (M. de Beaufort) and vice-president (Jonkheer van Karnebeek, first delegate of The Netherlands). Both propositions were unanimously approved. The Conference thereupon elected the secretaries and adjourned.

The first meeting of the Conference was in the nature of things purely formal; the second session, held May 20, outlined

<sup>1</sup> Conférence Internationale de la Paix, 1899, part I, p. 10.

<sup>2</sup> Ibid., p. 11.

the work before the delegates and the means by which it was hoped positive results would best be accomplished.

In the course of his remarks on this occasion, the president, M. de Staal, stated that the principal object of the deliberations of the Conference was

“to seek the most efficacious means to assure to all peoples the blessings of a real and durable peace, that the Peace Conference must not fail in the mission which devolves upon it; it must offer a result of its deliberations which shall be tangible, and which all humanity awaits with confidence,” and that “the eagerness which the Powers have shown in accepting the proposition contained in the Russian Circular is the most eloquent testimony of the unanimity which peaceful ideas have attained.”

He said that the very membership of the assembly, consisting of eminent diplomats, renowned *savants* in the domain of international law, and the general and superior officers of the armies and navies

“is a certain guarantee of the spirit in which the Conference approached the labor which had been confided to it. . . .

“Diplomacy,” he continued “has for its objects the prevention and appeasement of conflicts between States; the softening of rivalries, the conciliation of interests, the clearing up of misunderstandings, and the substitution of harmony for discord. I may be permitted to say that in accordance with the general law, diplomacy is no longer only an art in which personal skill enjoys exclusive prominence. It is tending to become a science, which should have its own fixed rules for the solution of international conflicts. This is today the ideal object which ought to be before our eyes.”

The Conference, he said, would also undertake to generalize and codify the practice of arbitration, of mediation and of good offices, the most useful object being to prevent conflicts by pacific means. He stated that the Conference should not endeavor to follow abstractions but to remain in the domain of reality. In the actual state of affairs, he continued,

We perceive between nations an amount of material and moral interests which is constantly increasing. The ties which unite all parts of the human family are ever becoming closer. A nation could not remain isolated if it wished. It finds itself

surrounded, as it were, by a living organism fruitful in blessings for all, and it is, and should be, a part of this same organism. . . . If, therefore, the nations are united by ties so multifarious, is there no room for seeking the consequences arising from this fact? When a dispute arises between two or more nations, others, without being concerned directly, are profoundly affected. The consequences of an international conflict occurring in any portion of the globe are felt on all sides. It is for this reason that outsiders can not remain indifferent to the conflict—they are bound to endeavor to appease it by conciliatory action.

M. de Staal pointed out the great need for peace, that arbitration and mediation were among the means employed for insuring it, that diplomacy had not fixed the method of their employment nor defined the cases in which they are allowable, and that it was to this high labor that the Conference must concentrate its efforts; that when an armed conflict between nations cannot be absolutely prevented, it becomes a great work for humanity to mitigate the horrors of war, and that, while the Governments of civilized States had all entered into international agreements, it was for the Conference to establish new principles. He stated that the Conference would also consider the question of the limitation of armaments.

As to the method of procedure of the Conference, the president submitted the following proposal:

One of our preliminary duties in order to insure the progress of our work is to divide our labors, and I therefore beg to submit for your approval the following proposal. Three Committees shall be appointed. The First Committee shall have charge of the Articles 1, 2, 3, and 4 of the Circular of December 30, 1898. The Second Committee of Articles 5, 6, and 7. The Third Committee shall have charge of Article 8 of the said Circular, and each Committee shall have power to subdivide itself into sub-committees.

It is understood that outside of the aforementioned points the Conference does not consider itself competent to consider any other question. In case of doubt the Conference shall decide whether any proposition originating in the Committee is germane or not to the points outlined. Every State may be represented upon every Committee. The First Delegates shall designate the members of the respective delegations who shall

be members of each of the Committees. Members may be appointed upon two or more Committees. In the same manner as in the full Conference, each State shall have but one vote in each Committee. The Delegates, representing the Governments, may take part in all the meetings of the Committees. Technical and scientific Delegates may take part in the full meetings of the Conference. The Committees shall appoint their own officers and regulate the order of their labors.<sup>1</sup>

Leaving out of consideration the dispositions of a general nature, it will be seen that the program of the Conference introduced certain subjects, which, from their general similarity, might properly form a group and be assigned to a committee or commission of the Conference charged with their discussion and examination. The various subjects dealing with armaments and disarmament, land and naval warfare, might form a group by themselves, comprised of the first seven articles. Article 8, dealing with the peaceful settlement of international difficulties, would appropriately be separated from rules and regulations concerning warfare, and form material for a separate commission. But a closer analysis of Articles 1 to 7 shows that they are susceptible of a further sub-division, for several of them deal with land warfare, whereas others relate more particularly to naval warfare. It would have been possible, and perhaps more logical, to have adopted the inherent nature of the various propositions as the test, and to have referred military matters to one committee and naval matters to another. The principle of sub-division was recognized but not logically or rigorously applied. For example, Articles 1, 2, 3 and 4, of the Circular of December 30, were referred to the First Commission. Articles 5, 6, 7, two of which deal with naval matters, and the third (Article 7) with the laws and customs of land warfare, were referred to the Second Commission; Article 8, concerning the peaceful settlement of international difficulties, was referred to the consideration of the Third Commission, which, both from the importance of the subject and from the results achieved, not only justified the

<sup>1</sup> Conférence Internationale de la Paix, 1899, part I, pp. 12-14.



name universally given to the Conference, but would in itself have justified the assembling of an international conference.

The Conference itself was divided into two great divisions, the conference in plenary session on the one hand, and the three commissions on the other, to which the various articles of the program were referred for such disposition as they might find possible to make. Each commission was given the right to perfect its organization, and to conduct its proceedings as it deemed expedient. The result of its deliberations was to be reported to the Conference for adoption in plenary session.

The official language of the Conference was French. The various reports and texts presented for adoption were written and presented in French, and French was the language ordinarily used as the means of communication. Other languages were permitted, and were used on occasion by various delegates, but the addresses were translated into French immediately upon delivery, and in printed and permanent form they appear in French in the records of the Conference. Procès-verbaux, or formal minutes of the proceedings, were drawn up by the secretaries of the Conference and distributed both for the information of the members and for the purposes of correction, so that the completed record of the Conference appears in the procès-verbaux of the plenary session of the Conference, in the procès-verbaux of each of the commissions, the reports of the various reporters of the commissions and sub-commissions, and in the Final Texts ultimately adopted.

The question of publicity was one which greatly perplexed the Conference; for two legitimate interests found themselves in almost irreconcilable opposition: the interest of the public on the one hand which wished to know exactly what took place; and the interest of the Conference on the other, which desired, as far as possible, to conduct its labors and reach conclusions without subjecting itself in advance to criticism, however honest and sincere, based upon judgments formed at a distance and upon an imperfect understanding of the aims and purposes of the Conference. A compromise was therefore

attempted. The secrecy of the proceedings of the sessions was adopted as the rule.<sup>1</sup> To satisfy the legitimate curiosity of the public in as large a measure as possible, the president was authorized in his discretion to make communications to the press. As the desire of the press is for full and accurate information, it can not be said that the compromise was wholly satisfactory.

#### 4. THE FIRST COMMISSION—THE LIMITATION OF ARMAMENTS

At the meeting of the First Commission, held on June 23, 1899, M. Beernaert, of Belgium, its president, stated truly and accurately that the question of setting a limit to progressive increase of armaments is difficult, and that it would be impossible to exaggerate its importance; for the question of armed peace is not only bound closely to that of wealth and of the highest form of progress, but also to the question of social peace. He asked, for example, if the agreement should provide for the number of effective forces, or for the amount of the budget of military expenses, or if for both of these, how should the numbers be fixed and verified? Should the armies of today be taken as the basis for the designation? Are naval forces to be treated the same as armies? What shall be done about the defense of colonies?<sup>2</sup> M. de Staal stated the essential point before the commission as the question of the limitation of budgets and of actual armaments.

"It seems to me indispensably necessary," he said, "to insist that this important question should be made the subject of a

<sup>1</sup> The American Delegation was strongly in favor of the publicity of the proceedings. At the third session of the Third Commission (June 5, 1899) M. Beldiman of Roumania stated that "a document recently distributed marked 'secret' was published four days previously in *The Times* and reproduced the next day in the *Cologne Gazette*. It is the American project concerning the institution of a permanent tribunal of arbitration." (*Conférence Internationale de la Paix*, 1899, part IV, Third Commission p. 5.) No doubt many such instances occurred.

<sup>2</sup> *Conférence Internationale de la Paix*, 1899, part II, First Commission, pp. 20-21.



most profound study, constituting, as it does, the first purpose for which we are here united, that of alleviating, so far as possible, the dreadful burden which weighs upon the peoples, and which hinders their material and even moral development. . . . Armed peace today causes more considerable expense than the most burdensome war of former times. . . . Is it necessary for me to declare," he continued, "that we are not speaking of Utopias or chimerical measures? We are not considering disarmament. What we are hoping for, is to attain a limitation—a halt in the ascending course of armaments and expenses. . . . For the moment we aspire to the attainment of stability for fixed limitation of the number of effectives and of military budgets."<sup>1</sup>

Colonel Gilinsky, technical delegate of Russia, thereupon submitted the texts of the Russian propositions:

1. An international agreement for the term of five years, stipulating for the nonaugmentation of the present number of troops kept in time of peace.
2. The determination, in case of such an agreement, if it is possible, of the number of troops to be kept in time of peace by all of the Powers, not including Colonial troops.
3. The maintenance, for the term of five years, of the amount of the military budget in force at the present time.<sup>2</sup>

As regards navies, Captain Schéine, Russian naval delegate, presented the following:

The acceptance in principle of fixing for a term of three years the amount of the naval budget, and an agreement not to increase the total amount for this triennial period, and the obligation to publish during this period, in advance:

1. The total tonnage of men-of-war which it is proposed to construct, without giving in detail the types of ships.
2. The number of officers and crews in the navy.
3. The expenses of coast fortifications, including fortresses, docks, arsenals, etc.<sup>3</sup>

For a detailed consideration of the military proposals, a sub-commission was appointed, and in like manner the naval proposals were submitted to another sub-commission. The military committee charged with the investigation of the

<sup>1</sup> Conférence Internationale de la Paix, 1899, part II, First Commission, pp. 21-22. See also Holls' Peace Conference, p. 70-72.

<sup>2</sup> Ibid., pp. 23-25. See also Holls' Peace Conference, p. 72.

<sup>3</sup> Ibid., p. 26. See also Holls' Peace Conference, p. 72.

first proposal reported through M. Beernaert, its president, the following:

The members of the committee, to whom was referred the proposition of Colonel Gilinsky, regarding the first point in the Circular of Count Mouravieff, after two meetings, report, that with the exception of Colonel Gilinsky they are unanimously of the opinion, first, that it would be very difficult to fix, even for a period of five years, the number of effectives, without regulating at the same time other elements of national defense; second, that it would be no less difficult to regulate by international agreement the elements of this defense, organized in every country upon a different principle. In consequence, the committee regrets not being able to approve the proposition made in the name of the Russian Government. A majority of its members believe that a more profound study of the question by the Governments themselves would be desirable.<sup>1</sup>

The report of the sub-commission on naval affairs was of like tenor. In a word, the sub-commissions considered the proposals in their present form, and indeed in any form, unacceptable, and had it not been for the great tact and large heart of M. Bourgeois, first delegate from France, it is possible that an absolute failure would have been reported to the Conference. In a speech of great power and beauty he declared that

if the great resources, which are now devoted to military organization, would, at least in part, be put to the service of peaceful and productive activity, the grand total of the prosperity of each country would not cease to increase at an even more rapid rate. . . . The object of civilization seems to us to be to abolish more and more the struggle for life between men, and to put in its stead an accord between them for the struggle against the unrelenting forces of matter. This is the same thought which, upon the initiative of the Emperor of Russia, it is proposed that we should promote by international agreement. If sad necessity obliges us to renounce for the moment an immediate and positive engagement to carry out this idea, we should at least attempt to show public opinion that we have sincerely examined the problem presented to us. We shall not have labored in vain if in a formula of general terms we at least indicate the

<sup>1</sup> Conférence Internationale de la Paix, 1899, part II, First Commission, pp. 31-32; Holls' Peace Conference at The Hague, p. 83.

goal to be approached, as we all hope and wish, by all civilized nations.<sup>1</sup>

Mr. Bourgeois thereupon proposed the following resolution, applicable alike to military as well as naval charges, which was unanimously adopted by the commission and approved by the Conference:

The Committee considers that a limitation of the military charges which now weigh upon the world is greatly to be desired in the interests of the material and moral welfare of humanity.<sup>2</sup>

The resolution expressed a sentiment highly honorable and creditable to the Conference, but it neither bound the nations to do anything, nor did it suggest any specific or future action. In addition, however, to the adoption of the resolution, the Conference expressed the wish that

the Governments, taking into consideration the proposals made at the Conference, may examine the possibility of an agreement as to the limitation of armed forces by land and sea, and of war budgets.<sup>3</sup>

It is needless to say that the American delegates sympathized profoundly with the views expressed in the Russian Circular, and that they took an active share in the discussions of the commission, but as members of the delegation they were guided by their instructions, which deprived them of initiative and controlled their vote. For example, the instruction on the first article, the one under discussion, is as follows:

The first article, relating to the nonaugmentation and future reduction of effective land and sea forces, is, at present, so inapplicable to the United States that it is deemed advisable for the delegates to leave the initiative upon this subject to the representatives of those Powers to which it may properly belong. In comparison with the effective forces, both military and naval, of other nations, those of the United States are at present so far below the normal quota that the question of limitation could not be profitably discussed.<sup>4</sup>

<sup>1</sup> Conférence Internationale de la Paix, 1899, part II, First Commission, pp. 33-34. Holls' Peace Conference, pp. 87-90.

<sup>2</sup> Ibid., p. 34. See also Holls' Peace Conference, p. 90.

<sup>3</sup> Final Act of the International Peace Conference, Vol. II, p. 79.

<sup>4</sup> Instructions to the International Peace Conference, Vol. II, p. 7.

Therefore, at the last meeting of the First Commission, held on July 17, Captain Mahan, on behalf of the American delegation, expressed sympathy and its views in the following measured paragraphs:

The delegation of the United States of America have concurred in the conclusions upon the first clause of the Russian letter of December 30, 1898, presented to the Conference by the First Commission, namely: that the proposals of the Russian representatives, for fixing the amounts of effective forces and of budgets, military and naval, for periods of five and three years, cannot now be accepted, and that a more profound study upon the part of each State concerned is to be desired. But, while thus supporting what seemed to be the only practicable solution of a question submitted to the Conference by the Russian letter, the delegation wishes to place upon the record that the United States, in so doing, does not express any opinion as to the course to be taken by the States of Europe.

This declaration is not meant to indicate mere indifference to a difficult problem, because it does not affect the United States immediately, but expresses a determination to refrain from enunciating opinions upon matters into which, as concerning Europe alone, the United States has no claim to enter. The resolution offered by M. Bourgeois, and adopted by the First Commission, received also the hearty concurrence of this delegation, because in so doing it expresses the cordial interest and sympathy with which the United States, while carefully abstaining from anything that might resemble interference, regards all movements that are thought to tend to the welfare of Europe. The military and naval armaments of the United States are at present so small, relatively, to the extent of territory and to the number of the population, as well as in comparison with those of other nations, that their size can entail no additional burden or expense upon the latter, nor can even form a subject for profitable mutual discussion.<sup>1</sup>

The instructions of the American Government on the second, third and fourth articles of the Russian Circular, while they prescribed a line of conduct to the American delegation, so clearly expressed the view of the Conference, that the single paragraph in which they are contained deserves quotation:

The second, third, and fourth articles, relating to the non-employment of firearms, explosives, and other destructive agents,

<sup>1</sup> Conférence Internationale de la Paix 1899, part II, pp. 39-40, Plenary Sessions.



the restricted use of existing instruments of destruction, and the prohibition of certain contrivances employed in naval warfare, seem lacking in practicability, and the discussion of these propositions would probably prove provocative of divergence rather than unanimity of view. It is doubtful if wars are to be diminished by rendering them less destructive, for it is the plain lesson of history that the periods of peace have been longer protracted as the cost and destructiveness of war have increased. The expediency of restraining the inventive genius of our people in the direction of devising means of defense is by no means clear, and, considering the temptations to which men and nations may be exposed in a time of conflict, it is doubtful if an international agreement to this end would prove effective. The dissent of a single powerful nation might render it altogether nugatory. The delegates are, therefore, enjoined not to give the weight of their influence to the promotion of projects the realization of which is so uncertain.<sup>1</sup>

The second, third, and fourth clauses of the Russian Circular of December 30 were likewise referred to the First Commission, and by it the second and third paragraphs dealing with military matters were assigned for study and report to the sub-commission for the consideration of military affairs, and the paragraph dealing with naval matters was referred to the Second Sub-Commission to which was entrusted consideration of naval affairs. In regard to the proposition that the small arms of the army and the large cannon of the navy be not changed for a period of five and three years, respectively, the small States, imperfectly armed, insisted that they have the privilege either of discarding the old models and adopting the improved arms in use by the larger nations, or that they be permitted to improve their old equipment, so that it be in fact equal to the more modern variety. Again, it was insisted that permission be given to improve the arm, provided it did not change the type. The result of these two provisions was unacceptable in theory, because the adoption of new arms of the permitted standard would have involved an outlay of large sums of money, as would also be the case with improvements of the type, and the limitation to a certain type for a

<sup>1</sup> See instructions to the American International Peace Conference, Vol. II, p. 7.



period of years would fetter the inventive agency of the various nations, and thus deprive the army of an efficient weapon in the case of war. The desired economy would thus fail; the efficiency of the army would suffer, and the technical difficulties involved in the examination of the approved or substituted arm, added to the lack of an effective supervision and control of any agreement if reached, interposed insuperable obstacles to a convention.

The Conference did, however, express the wish that the questions with regard to rifles and naval guns, as considered by it, may be studied by the Governments with the object of coming to an agreement respecting the employment of new types and calibers.<sup>1</sup>

It is not for a layman to sit in judgment upon the validity of these arguments. They were decisive and convincing to the delegates, and show the difficulty of limiting the means and instruments of warfare until an acceptable substitute has been devised for war. The proposed interdiction of new explosives was disapproved by a vote of twelve to nine in the First Sub-Commission, and the proposal forbidding the employment of more powerful powders than those now in use was unanimously rejected.<sup>2</sup> The fourth paragraph, prohibiting the use in naval battles of submarine or diving torpedo boats, or of other engines of destruction of the same nature, as well as the proposal not to construct in the future ships armed with rams, was found unacceptable in its entirety.

Other portions of the second and third paragraphs fared better, and resulted in a prohibition for a term of five years of the launching of projectiles and explosives from balloons, or by other new methods of a similar nature;<sup>3</sup> an agreement to refrain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions;<sup>4</sup>

<sup>1</sup> Final Act of the International Peace Conference, Vol. II, p. 79.

<sup>2</sup> General Den Beer Poortugael Report, La Conférence Internationale de la Paix, 1899, part II, First Commission, p. 10.

<sup>3</sup> See Declaration on the subject, Vol. II, p. 153.

<sup>4</sup> See Declaration, Vol. II, p. 157.

and from the naval sub-commission a declaration to abstain from the use of projectiles, the sole object of which is the diffusion of asphyxiating or deleterious gases.<sup>1</sup>

The positive result of the labors of the First Commission was far from encouraging, and while the discussion was valuable, it can not be said that the conclusions reached would have justified in themselves the calling of a conference for their consideration. Whether or not countries will agree to limit their armies and navies, and will adopt uniform armament for land and naval forces, is a question which time only can answer. It may safely be said, however, that they will not do so, while threatened with danger from without, and a plausible reason exists both for their maintenance and increase. The nations in this are not at fault. As long as a resort to force for the settlement of international difficulties is regarded as a proper, if not the only and reasonable expedient, no nation is likely to expose itself to strong, aggressive, and not over-scrupulous neighbors, by depriving itself of the recognized means of protection and self-assertion. The means of warfare and the preparation for war will exist until a substitute for war be proposed which is not only reasonable in itself, but which is so reasonable that its non-acceptance would be unreasonable. It may be that the inter-relation and interdependence of States must be accepted in theory and practice, and that the judicial organization of the world be realized before armies and navies will cease to be used in foreign affairs, and will be confined to protecting commerce and policing the seas.

Leaving questions of this nature, and returning to the more limited and immediate purpose, the procedure of the Conference is seen to be reference to a commission; that this commission, for purposes of dispatch as well as for careful consideration, formed appropriate sub-commissions to which various questions were referred for study and report. The procedure was simple and on the whole adequate, but a further statement should be made in order to show how the commission dealt with proposed amendments, because the disposition of

<sup>1</sup> See Declaration, Vol. II, p. 155.

amendments explains a matter of procedure likely to affect not merely regularity of the proceeding, but its ultimate result. In parliamentary assemblies, and a conference as already explained is not a parliament, it is customary in the first instance to take a vote upon an amendment, and then upon the original question. By such a method, simple as it is expeditious, the view of the body is expressed both upon the amendment and upon the original proposition. The procedure followed in the Conference was, on an important occasion, the reverse.<sup>1</sup> It should be said in passing that the Second Conference reversed the procedure of the first, and by submitting the amendment first to vote brought the proceedings of the Conference into harmony with parliamentary law.

#### 5. THE SECOND COMMISSION—THE GENEVA CONVENTION. THE LAWS AND CUSTOMS OF WAR

The procedure followed in the Second Commission was the same as that followed in the first, namely, the extension to maritime warfare of the principles of the Geneva Convention of August 22, 1864, was referred to a First Sub-Commission, and this in turn divided itself, and appointed a committee, composed of experts, for the elaboration of a project. The

<sup>1</sup> For example, in the matter of explosive bullets, Captain Crozier on behalf of the American delegation, proposed an amendment which would prevent the use of an improper bullet, whatever its mechanical device might be, whereas the original proposition of the commission prohibited merely a bullet made in a particular manner. Another bullet made in a different way might produce equally serious consequences, if its use be permitted, whereas Captain Crozier's formula would prevent the result, whatever the means used. The commission refused to take a vote first on the amendment, and when the original proposition was adopted, there was no longer a necessity for considering the amendment. In this case, it is highly probable, as Mr. Holls points out, that the amendment would have been lost in any event, but had it been first put to a vote, each delegation represented at the Conference would have been forced by this simple machinery to express its views on both propositions. In any case, a well-recognized parliamentary expedient would have been adopted. See the elaborate discussion on this question in *Conférence Internationale de la Paix*, 1899, part I, Sixth Plenary Session, pp. 55-61.

Holls' Peace Conference, pp. 113-114.

project as elaborated by the sub-commission and approved by the Conference, resulted in the convention for the adaptation to maritime warfare of the principles of the Geneva Convention of August 22, 1864. In the same manner, Article 7 of the program relating to the revision of the declaration concerning the laws and customs of war elaborated in 1874 by the Conference of Brussels, was referred to the Second Commission, which, in turn, assigned the topic to a sub-commission which worked out the project which, adopted by the Conference, appears as the convention with respect to the laws and customs of war.

The two conventions, however, were not the only results of the deliberations of the Second Commission, for, after much thought and at times prolonged and heated discussion, the commission reported four recommendations which, approved by the Conference, find an appropriate place in the Final Act. Of each of these in turn.

In opening the labors of the Second Commission, its distinguished president M. de Martens indicated that the Geneva Convention of 1864 would be the subject of consideration and study. M. Renault called attention to the fact that it was not included in the Russian program. At the next session of the commission, M. de Martens admitted the correctness of M. Renault's contention, but stated, and it would seem very properly, that the discussion of the additional articles of 1868 would necessarily involve the Red Cross Convention of 1864. As, however, the program did not include its revision, the commission restricted itself to the formulation of a recommendation for its revision.

After much discussion in the Second Sub-Commission, in the full commission, and in the fifth session of the Conference, the following *vœu* was finally adopted:

The Conference, taking into consideration the preliminary steps taken by the Swiss Federal Government for the revision of the Geneva Convention, expresses the wish that steps may be shortly taken for the assembly of a Special Conference having for its object the revision of that convention.<sup>1</sup>

<sup>1</sup> Vol. II, p. 79.



As Switzerland had summoned the Conference that drafted the original Red Cross Convention of 1864, and as Switzerland was thus closely and intimately associated with it both in its origin and development, the Conference voted that the States represented at The Hague would be happy to see Switzerland shortly take the initiative for the revision of the Convention of 1864. This was a recognition of the initiative of the Swiss Government; it was not a mandate in express terms to it to call a conference for the revision of the Geneva Convention of 1864. As will be seen in a subsequent lecture, the Swiss Government ultimately, with diplomatic slowness and propriety, did issue the call, and the Red Cross Convention was admirably revised in the summer of 1906.<sup>1</sup>

The Convention relative to the laws and customs of war deals primarily with the rights and duties of belligerents between themselves, and the relations which non-combatants and the inhabitants of occupied territory bear to belligerents. M. Eyschen, of Luxemburg, called attention to the fact in the fifth session of the Second Sub-Commission that the rights and duties of neutrals are of such fundamental importance that the work of the Conference would necessarily be imperfect unless the status of neutrality were studied and defined; that certain States, such as Switzerland, Belgium, and Luxemburg, had a peculiar interest in the codification of the rights and duties of neutrals, both from their international and geographical position. The Sub-commission recognized the importance of the subject, but as the commission was limited to the revision of the Brussels declaration, a convention on neutrality was beyond its scope. Added to this, the difficulty, delicacy, and intricacy of the subject would suggest that the codification of neutrality be referred to future regulation. Upon the suggestion of M. de Martens, in the Second Sub-Commission, sixth session, the following *vœu* was adopted relegating the entire subject to a future conference:

The Conference expresses the wish that the questions of the

<sup>1</sup>For a full account of the revision, see the *Actes de la Conférence de Genève*, 1906.



rights and duties of neutrals may be inserted in the program of a conference in the near future.<sup>1</sup>

The American delegation had been instructed to bring to discussion the immunity from capture of unoffending private property of the enemy upon the high seas. The question did not figure in the Russian program, and M. de Martens, president of the Second Commission, ruled it out of order, and in so doing was sustained by the commission. As a result of discussion, the commission expressed a desire that the immunity of private property should appear in the program of a future conference, and on July 5, 1899, the recommendation that it should so figure was adopted in the plenary session of the Conference.<sup>2</sup> Mr. White, on behalf of the American delegation, made a careful and elaborate argument in support of the immunity of private property, and the address *in extenso* was, upon motion, spread upon the minutes of the session. Although the Conference took no action on the subject other than to recommend it to a future conference, right of way was thus secured for its future consideration.<sup>3</sup>

In the same way it was held that the subject of the naval bombardment of ports and towns was beyond the scope of a program limited to a consideration of the laws and customs of land warfare. Upon the suggestion of M. de Martens, the Conference expressed

the wish that the proposal to settle the question of the bombardment of ports, towns, and villages by a naval force may be referred to a subsequent conference for consideration.<sup>4</sup>

Important as were these two conventions and recommendations prepared by the Second Commission, they would not in themselves, any more than the more meager results of the First

<sup>1</sup> Final Act of the International Peace Conference, Vol. II, p. 79.

<sup>2</sup> Ibid.

<sup>3</sup> Conférence Internationale de la Paix, 1899, part I, Fifth Plenary Session, pp. 31-33. See also Dr. White's Autobiography, Vol. II, pp. 254, 260, 262, 266, 283, 287, 289, 290, 296, 316, 328; Holls' Peace Conference at The Hague, pp. 306-321.

<sup>4</sup> Conférence Internationale de la Paix, 1899, part I, Fifth Plenary Session, p. 31; Final Act of the International Peace Conference, Vol. II, p. 79.

Commission, have justified an international peace conference; for, as Mr. Holls properly says, they,

. . . were largely, if not wholly, of a technical, military, or naval character, and the results obtained could, perhaps, have been accomplished by a meeting of experts, corresponding to the famous assemblies of Geneva and Brussels, or to the Postal and Marine Conferences of a later date.<sup>1</sup>

This statement, however, is not meant in any way to detract from the importance of the work, for an international conference may well deal with land and naval warfare, and by international agreement remove the hardships and unnecessary suffering incident to war. The purpose and the result are no doubt humanitarian, but these various conventions presuppose the existence of war. The Conference was originated, however, for the maintenance of general peace and to secure the establishment of the principles of justice and right upon which repose the security of States and the welfare of peoples.

#### 6. THE THIRD COMMISSION—THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES

Article 8 of the second circular sought to specify in detail the various means by which the maintenance of general peace might be safeguarded and found it in an agreement to accept in principle the employment of good offices, of mediation and facultative arbitration in cases lending themselves thereto, with the object of preventing armed conflicts between nations, to come to an understanding with respect to the mode of applying these good offices, and to establish a uniform practice in using them.

The importance of this article and its consideration lay in the fact that it sought, by removing causes of irritation, to prevent armed conflict between nations and, by providing a substitute for war, to prevent the danger of war. Law-givers in all ages have sought to forbid the individual from a recourse to arms in his own behalf, and, notwithstanding centuries of experiment, it cannot be said that the instinct of self-help has

<sup>1</sup> Holls' Peace Conference, p. 164.

been eradicated so far as to compel an appeal to courts of justice for real or fancied wrongs without resorting to self-help in times of passion. If an individual nation is unable by an elaborate and refined code with penalties for its infraction to prevent self-redress, it is Utopian to hope that a conference could, by a single convention, without specific penalties for its infraction, prevent nations, which after all are but aggregations of individuals, from a recourse to force when national feeling and prejudice are aroused. It is, however, within the range of possibility, and it is the task of enlightened statesmanship, as far as possible, to devise means for the peaceful settlement of international disputes before they have reached an acute stage. As experience shows that nations in moments of passion are not able to discuss impartially the facts involved in a particular dispute, and indeed are often mistaken as to the fact and therefore as to the merits of the controversy, it would seem that the creation of machinery whereby these facts might be ascertained by a neutral or impartial body, before passion had become inflamed, would go far to prevent nations from rushing to arms. The Third Commission of the First Conference was fortunate enough to find such means and to create such machinery, and the convention for the peaceful adjustment of international differences not only justified the calling of the Conference, but realized in large and unexpected measure the hope of the illustrious monarch to whom it owed its being.

The Conference was here upon safe ground and was able to utilize the experience of the immediate past, which has declared itself in no uncertain manner for arbitration as a substitute for force. A careful consideration of Article 8 and the resulting convention for the peaceful adjustment of international difficulties shows that each clause of Article 8, as contained in the second circular of the Russian Government, found an appropriate place in the convention. The inspiration of an enlightened and generous mind with the coöperation of statesmen and diplomatists resulted in what Mr. Holls is pleased to term the Magna Charta of international law.

The procedure by which this remarkable result was attained was the same as that followed by the first two commissions. The article was referred to the Third Commission which had the good fortune to be presided over by M. Léon Bourgeois, to whose infinit tact, kindness and courtesy and genius in removing difficulties, which, if unremoved, would prevent agreement, is due in no small measure the success of the commission and the justification of the Conference.

At the first session of the Third Commission, M. Bourgeois stated:

The Third Commission has this good fortune, that no division can exist among its members on the general ideas which are the bases of its work. They are assured that they will go forth together in one direction on a common pathway.

The president's duty is to try to put as far distant as possible the point upon this route to which all will be able to continue their journey together.

The president again recalls the fact that the commission is bound to keep its deliberations secret. A *procès-verbal* in manuscript will be taken and preserved in the office of the conference, where it may be consulted. An analytical summary will be printed and sent to the members of the commission, who, of course, will be communicated with before the publication, in regard to the part which concerns them. Since questions relating to arbitration present a unified character, the president thinks there is no need of dividing the commission into sub-commissions.<sup>1</sup>

At the second session of the commission held May 26, 1899, M. Bourgeois outlined the procedure which he deemed advisable to be followed by the commission. He said:

It is proper first to examine the general principle which brings us together.

Do we all agree, following the expression of M. Descamps, to try to establish relations between nations preferably according to law, and to regulate them, in case of dispute, according to justice? In other words, is it more desirable to have recourse to peaceful means rather than to force in settling disputes between nations?

If we all agree upon this general principle, we shall then seek means of arriving at this result.

<sup>1</sup> Conférence Internationale de la Paix, 1899, part IV, Third Commission, p. 1.



If the daily work of diplomacy, which can assure friendly agreement *directly*, is lacking, we shall seek means for friendly agreement, *indirectly*, by mediation. That could constitute the first chapter of our discussions.

Apart from mediation and by means still peaceful but now final, we shall have to examine arbitral procedure.

In the case of recourse to arbitration, we must establish the cases where this is possible, and make a list of them.

We will question next whether there are cases where nations can admit in advance that this recourse should be obligatory.

It will next be necessary to establish in advance an *arbitral procedure* accepted by all; on all these points we can take the Russian project, which has just been distributed, for a guide.

Having established the cases where arbitration is conventionally obligatory or optional, and the procedure being fixed, what means shall be employed to make the practice general?

Will it be preferable to proceed by extending the system of arbitration treaties by introducing the arbitration clause in international acts?

Or, on the contrary, shall there be established in a permanent manner an international institution to which an order would be given:

1. Be it simply in the guise of an intermediary, to remind the parties of the existence of the conventions, the possible application of arbitration and offering to set the procedure in motion;

2. Be it as a means of conciliation previous to all judicial discussion;

3. Be it finally in the form of jurisdiction as an international tribunal.

If the commission approves this suggestion, the order of our discussions will be expedited.<sup>1</sup>

Upon the conclusion of this address, Sir Julian Pauncefote, whose name is inseparably connected with the establishment of the Permanent Court, presented a proposition for the establishment of a permanent court to which nations in litigation might resort for arbitration of their difficulties. He said:

Permit me, Mr. President, to ask you before going deeper into the matter, if it would not be useful and opportune to sound the commission on the subject which I believe to be the most important, that is, the establishment of a permanent international court of arbitration, which you have touched upon in your remarks.

<sup>1</sup> Conférence Internationale de la Paix, 1899, part IV, Third Commission, pp. 2-3



Many arbitration codes and rules of procedure have been made, but the procedure has up to the present time been regulated by the arbitrators or by general or special treaties.

Now it seems to me that new codes and rules of arbitration, whatever be their merit, do not greatly advance the great cause which brings us together.

"If we want to make a step forward, I believe that it is absolutely necessary to organize a permanent international tribunal which may be able to assemble at once upon the request of the disputing nations. This principle being established, I do not believe that we shall have much difficulty in agreeing on the details. The necessity of such a tribunal and the advantages which it would offer, as well as the encouragement and even inspiration which it would give to the cause of arbitration, has been demonstrated with as much eloquence and force and clearness, by our distinguished colleague, M. Descamps, in his interesting essay on arbitration, an extract from which is included in the acts and documents so graciously furnished to the conference by the Netherlands Government. There is therefore nothing more for me to say upon this subject, and I shall be grateful to you, Mr. President, if before going any further, you consent to receive the ideas and sentiments of the commission upon the proposition which I have the honor to submit concerning the establishment of a permanent international court of arbitration.<sup>1</sup>

At the beginning of its labors, the commission found itself in the presence of a Russian project concerning good offices and mediation, a draft convention for voluntary and obligatory arbitration, a code of arbitration and a British motion for the establishment of a court of arbitration. The president considered it difficult to discuss the texts in the commission, and he therefore proposed the formation of a special commission charged with their examination. But before naming the commission, he declared that the assembly had unanimously recognized that it is preferable to resort to pacific means rather than to force for the adjustment of disputes between nations.

"I think," he said, "that the affirmation of this idea common to all, fixes the bounds of this meeting and permits us to pass advantageously to the discussion of its applications."<sup>2</sup>

<sup>1</sup> Conférence Internationale de la Paix, 1899, part IV, Third Commission, p. 3.

<sup>2</sup> Ibid., p. 4.

Leaving the details to subsequent consideration, it appears that the procedure followed by the Third Commission was similar to that previously described, with the difference that the commission did not divide itself into sub-committees, but appointed a committee of examination, to which the various projects were submitted, considered and reported to the commission for eventual adoption. As is well known, the committee of examination justified its appointment and presented to the commission and Conference the convention which is the permanent monument of the First Hague Peace Conference. The result, however, was not reached without difficulty, and at one time it seemed unlikely that the delegates would be able to agree. Germany objected to the establishment of the Permanent Court of Arbitration, and, to quote Holls,

the sessions were suspended by common consent, in order to give an opportunity to the German representative, Dr. Zorn, to proceed to Berlin in order to discuss the objections which had been raised, which were technical, though by no means frivolous, in their nature. At the suggestion of Prince Münster and Ambassador White, and with the cordial assent of the other members of the Committee, Mr. Holls of the United States also went to consult with Prince Hohenlohe and Count von Bülow upon the same subject, and the joint efforts of the two delegates were completely successful. Other similar crises were happily averted without friction or publicity.<sup>1</sup>

The incident briefly alluded to in the quotation from Mr. Holls was of the gravest importance, and threatened to wreck the Conference; for hope had centered around the work of the Third Commission, and it was believed—not without reason—that a convention for the peaceful settlement of international difficulties would not only satisfy public opinion, but would justify in itself the call of the Conference. The original skepticism with which the delegates assembled at The Hague, the pessimism which pervaded the early days of its session, had given way to the belief that something of permanent value would be accomplished. The failure of the First Commission

<sup>1</sup> Holls' Peace Conference, pp. 170-171.

to reach an agreement upon the limitation or decrease of armament caused not a little disappointment. The success of the Second Commission in codifying, in a highly acceptable form, the laws and customs of warfare on land, and the extension of the beneficent principles of the Red Cross to maritime warfare, show that the Conference would not have met and labored in vain. But the hopes of the friends of peace were centered in the Third Commission. It was not enough to consecrate good offices and mediation by an international agreement, nor was the establishment of a commission of inquiry for the ascertainment of disputed facts a sufficient concession to an expectant and enlightened public opinion. The friends of international progress and peace demanded a recognition of the principle of arbitration, the establishment of a tribunal of arbitration, and a code of procedure for the judicial settlement of international differences. The American delegation went to the Conference instructed to secure a permanent tribunal;<sup>1</sup> Great Britain, uninstructed, it would seem, on this point, accepted the idea, and Sir Julian Pauncefoot introduced a project which served as the basis of discussion. The Russian delegation espoused the idea and presented a project during the course of the proceedings. The possibility of a tribunal appealed to the imagination and invoked the enthusiasm of the delegates; and although Germany hesitated and Austria took the matter under advisement, the belief became general that opposition to a permanent tribunal of arbitration would yield to compromise and conciliation, and that a permanent tribunal would be established.

Under date of May 24, 1899, Mr. Andrew D. White, first delegate of the United States, noted in the interesting diary which he kept of the proceedings of The Hague, an interview with Count Münster, on the subject of arbitration:

"To my great regret," he says, "I found him entirely opposed to it, or, at least, entirely opposed to any well-developed plan. He did not say that he would oppose a moderate plan for

<sup>1</sup> Andrew D. White's *Autobiography*, Vol. II, p. 265; *Instructions to the International Peace Conference*, Vol. II, pp. 8-9.

voluntary arbitration, but he insisted that arbitration must be injurious to Germany; that Germany is prepared for war as no other country is or can be; that she can mobilize her army in ten days; and that neither France, Russia, nor any other power can do this. Arbitration, he said, would simply give rival powers time to put themselves in readiness, and would therefore be a great disadvantage to Germany."<sup>1</sup>

Mr. White's Diary is full of references to Count Münster, and one can not help but admire the gentle and tactful way in which Mr. White familiarized Count Münster with the advantages of arbitration, and of a permanent court for its administration and development. Under date of June 9, Mr. White writes:

At 6 o'clock Dr. Holls, who represents us upon the sub-committee on arbitration, came in with most discouraging news. It now appears that the German Emperor is determined to oppose the whole scheme of arbitration, and will have nothing to do with any plan for a regular tribunal, whether as given in the British or the American scheme. This news comes from various sources, and is confirmed by the fact that, in the sub-committee, one of the German delegates, Professor Zorn of Königsberg, who had become very earnest in behalf of arbitration, now says that he may not be able to vote for it. There are also signs that the German Emperor is influencing the minds of his allies—the sovereigns of Austria, Italy, Turkey, and Roumania—leading them to oppose it.<sup>2</sup>

On June 13, Mr. White records that

This morning come more disquieting statements regarding Germany. There seems no longer any doubt that the German Emperor is opposing arbitration, and, indeed, the whole work of the conference, and that he will insist on his main allies, Austria and Italy, going with him. Count Nigra, who is personally devoted to arbitration, allowed this in talking with Dr. Holls; and the German delegates—all of whom, with the exception of Count Münster, are favorably inclined to a good arbitration plan—show that they are disappointed. . . .

There seems danger of a catastrophe. Those of us who are faithful to arbitration plans will go on and do the best we can; but there is no telling what stumbling-blocks Germany and her

<sup>1</sup>Andrew D. White's Autobiography, Vol. II, p. 265.

<sup>2</sup>Ibid., pp. 293, 294.



allies may put in our way; and, of course, the whole result, without their final agreement, will seem to the world a failure and, perhaps a farce.<sup>1</sup>

On June 15, Count Münster called upon Mr. White, and after speaking of the immunity of private property, the subject of arbitration was taken up. Mr. White discussed the advantages to Germany of arbitration, and met especially the objection said to weigh with the Emperor, namely, that arbitration would be in derogation of his sovereignty. Count Münster seemed much impressed by the discussion, and Mr. White expressed the hope that he would

urge his Government to take a better view than that which for some time past has seemed to be indicated by the conduct of its representatives here.<sup>2</sup>

The crisis was now reached, for on June 16, to quote again from Mr. White's Diary:

This morning Count Münster called and seemed much excited by the fact that he had received a dispatch from Berlin in which the German Government—which, of course, means the Emperor—had strongly and finally declared against everything like an arbitration tribunal. He was clearly disconcerted by this too literal acceptance of his own earlier views, and said that he had sent to M. de Staal insisting that the meeting of the sub-committee on arbitration, which had been appointed for this day (Friday), should be adjourned on some pretext until next Monday; 'for,' said he, 'if the session takes place today, Zorn *must* make the declaration in behalf of Germany which these new instructions order him to make, and that would be a misfortune.' I was very glad to see this evidence of change of heart in the count, and immediately joined him in securing the adjournment he desired. The meeting of the sub-committee has therefore been deferred, the reason assigned, as I understand, being that Baron d'Estournelles is too much occupied to be present at the time first named. Later Count Münster told me that he had decided to send Professor Zorn to Berlin at once in order to lay the whole matter before the Foreign Office and induce the authorities to modify the instructions. I approved this course strongly, whereupon he suggested that I

<sup>1</sup> Andrew D. White's Autobiography, Vol. II, p. 298.

<sup>2</sup> Ibid., p. 306.



should do something to the same purpose, and this finally ended in the agreement that Holls should go with Zorn.

In view of the fact that Von Bülow had agreed that the German delegates should stand side by side with us in the conference, I immediately prepared a letter of introduction and a personal letter to Bülow for Holls to take, and he started about five in the afternoon. . . .<sup>1</sup>

Mr. White's letter, given in full in his Autobiography<sup>2</sup> is an admirable, convincing document, and, transmitted by Von Bülow to Hohenlohe, the Chancellor, and the German Emperor, it secured the reversal of the German policy, and positive instructions in favor of the proposed permanent court of arbitration. A final quotation, under date of June 23, from Mr. White's Autobiography, gives the conclusion of the incident, a triumph of American diplomacy and an enduring testimonial of the infinite tact and insight of Mr. White himself.<sup>3</sup>

<sup>1</sup> Andrew D. White's Autobiography, Vol. II, pp. 308, 309.

<sup>2</sup> Ibid., pp. 309-314.

<sup>3</sup> Dr. Zorn has given his version of the incident in a charming article, entitled the Peace Movement and the Hague Conference, which appeared in the Deutsche Revue for November, 1906. Dr. White states first hand his interview with Count Münster at The Hague. His account of negotiations at Berlin is necessarily based upon hearsay. Dr. Zorn as a witness and active participant in the negotiations at Berlin speaks with authority, and it is therefore of interest as well as importance that his account be given. For this reason I have translated the material portion of Dr. Zorn's article to which the writer kindly called my attention.

"The opinion has gone abroad that the American Delegate Holls exerted a decisive influence on the course of the deliberations, and that he even deserves the credit for Germany's decision to agree to the creation of a permanent court of arbitration and thus avert the dangers lying in Germany's unfavorable attitude. It is true that Holls himself does not state this in his work 'The Peace Conference' p. 171, but passes over the matter with a few general phrases and contents himself with the statement that 'the joint efforts of the [two delegates were completely successful.' Münsterberg, however, in his work on The Americans, p. 309, and White in his 'reminiscences,' directly state, and Münsterberg assured me by letter, that he had received this communication from Holls, who had died in the meantime. In his work on The Americans Münsterberg says: 'America also became an influential factor in the Hague Court of Arbitration. When the proceedings there were threatening failure on account of the opposition of several European nations, the

But the great matter of the day was the news, which has not yet been made public, that Prince Hohenlohe, the German chancellor, has come out strongly for the arbitration tribunal, and has sent instructions here accordingly. This is a great gain, and seems to remove one of the worst stumbling-blocks. But we will have to pay for this removal, probably, by giving up section 10 of the present plan, which includes a system of obligatory arbitration in various minor matters—a system which would be of use to the world in many ways. While the American delegation, as stated in my letter which Holls took to Bülow, and which has been forwarded to the Emperor, will aid in throwing out of the arbitration plan everything of an obligatory nature, if Germany insists upon it, I learn that the Dutch Government is much opposed to this concession, and may publicly protest against it.<sup>1</sup>

American Government sent its emissaries to the center of opposition and secured adherents to its desire for peace.'

"And in his memorial address on Holls in the Columbia University Münsterberg says: 'It was due to his own personal efforts that Germany desisted at a decisive moment from her opposition to the American propositions at the Hague Conference.'

"This story is a fable, and it is necessary that this fact be established.

"The esteem in which the American Ambassador White was held in Berlin is well known, and if he communicated his idea of the situation to the German officials it was no doubt interesting to them. That Holls went to Germany simultaneously with the German delegate and remained there several days is likewise correct. It is also true that Holls was received by the aged Imperial Chancellor, Prince Hohenlohe, in order that he might communicate his idea of the situation to the latter. Holls probably had instructions from Ambassador White to do this.

"But neither Holls nor the aged Prince Hohenlohe, who was then Imperial Chancellor, had anything to do with the discussion which preceded the decision or with the decision itself. The work on these matters was performed entirely within the Foreign Office under the direction of the then Secretary of State, von Bülow, now Imperial Chancellor. Holls was not received by the latter at that time, and returned to The Hague by way of Hamburg. As far as the preliminary official work was concerned, the decision was reached in the Foreign Office without any American influence, and the credit for it is due to the then Secretary of State von Bülow. Everything else is, to repeat it emphatically, pure fable. This disclosure of the facts is especially necessary in view of the fact that the central organ of the Peace advocates, the *Friedens-Warte*, published in Berlin considers as the absolute truth and publishes the statement that the German Empire only consented to the Hague Court of Arbitration in consequence of strong pressure brought to bear by America."—*Deutsche Revue*, November, 1906, pp. 141-142.

<sup>1</sup> A curious part of the means used in bringing about this change of

Mr. White was right in his belief that Article 10 of the Russian project, already approved by the sub-committee, prescribing compulsory arbitration in various minor matters, would have to be sacrificed.<sup>1</sup> But the establishment of the Permanent Court and the recognition of voluntary arbitration were worth the price. It is not without interest to note, in passing, that the opposition of Germany in 1907 to a modified form of Article 10 defeated the treaty of compulsory arbitration, voted by the representatives of thirty-two States at the Second Conference.

In the course of the session, there were three other instances which threatened unanimity, although they were not serious enough to be regarded as crises. They related to the wording as well as to the obligation involved in Articles 9, 27, and 55 of the convention for the peaceful adjustment of international differences.

Some of the smaller, especially the Balkan States, feared that Article 9, establishing a commission of inquiry, although limited to the examination and ascertainment of facts, might interfere seriously with their internal organization, and the opposition led by M. Beldiman of Roumania was embarrassing as well as bitter. Mr. White's entry in his Diary, under date of July 19, sufficiently states the controversy and the reasons supposed to influence the opposition:

Field day in the arbitration committee. A decided sensation was produced by vigorous speeches by my Berlin colleague, Beldiman, of the Roumanian delegation, and by Servian, opinion was the pastoral letter, elsewhere referred to, issued by the Protestant Episcopal bishop of Texas, calling for prayers throughout the State for the success of the conference in its efforts to diminish the horrors of war. This pastoral letter, to which I referred in my letter to Minister von Bülow, I intrusted to Holls, authorizing him to use it as he thought fit. He showed it to Prince Hohenlohe, and the latter, although a Roman Catholic, was evidently affected by it, and especially by the depth and extent of the longing for peace which it showed. It is perhaps an interesting example for an indirect "answer to prayer," since it undoubtedly strengthened the feelings in the prince chancellor's mind which led him to favor arbitration.—Autobiography, Vol. II, p. 322.

<sup>1</sup> Ibid., pp. 321-322.

Greek, and other delegates, against the provision for *commissions d'enquête*—De Martens, Descamps, and others making vigorous speeches in behalf of them. It looked as if the Balkan states were likely to withdraw from the Conference if the *commission d'enquête* feature was insisted upon: they are evidently afraid that such “examining commissions” may be sent within their boundaries by some of their big neighbors—Russia, for example—to spy out the land and start intrigues.<sup>1</sup>

It should be said, however, that in a spirit of compromise and conciliation, Article 9 was accepted as framed by M. Beldiman and has proved satisfactory in practice.

The next incident arose in connection with Article 27, which provides that

the Signatory Powers consider it their duty, in case a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court of Arbitration is open to them.

The Balkan States feared that the exercise of this “duty” might lead to intervention; that it was a provision in favor of the great powers, and against the interest of the smaller, because the latter could not, with any propriety, call the court to the notice of the great powers, whereas the great powers, by reason of their greatness, might insist that the small powers submit their controversy to the Permanent Court. Count Nigra of Italy disclaimed any intention to exercise the duty in an oppressive way, and denied that a distinction between great and small powers existed in the Conference; whereupon, to quote again Mr. White’s Autobiography,

Bourgeois, from the chair, gave us a specimen of first-rate French oratory. He made a most earnest appeal to the delegates of the Balkan States, showing them by such a system of arbitration as is now proposed the lesser powers would be the very first to profit, and he appealed to their loyalty to humanity.<sup>2</sup>

Mr. White’s comment fails to do justice to M. Bourgeois’ address on this occasion, because it was and undoubtedly will

<sup>1</sup> Andrew D. White’s Autobiography, p. 336.

<sup>2</sup> Ibid., p. 337.



remain a masterpiece, which, as Mr. Holls says, "ended with an outburst of eloquence which electrified the conference and led to a withdrawal of all hostile motions."

"The moral duty," said Mr. Bourgeois, "of the provisions of Article 27 is to be found entirely in the fact that a common duty for the maintenance of peace among men is recognized and affirmed among the nations. Do you believe that it is a small matter that in this Conference—not in an assembly of theorists and philosophers, debating freely and entirely upon their own responsibility, but in an assembly where the Governments of nearly all the civilized nations are officially represented—the existence of this international duty has been proclaimed, and that the idea of this duty, henceforth introduced forever into the conscience of the people, is imposed for the future upon the acts of the Government and of the nations? My colleagues who oppose this Article will, I hope, permit me to say this: I fear their eyes are not fixed on what should be their real purpose. In this question of arbitration they appeared to be concerned with the conflicting interests of the great and small Powers. I say, with Count Nigra, here there are no great, no small Powers; all are equal in view of the task to be accomplished. But should our work give greater advantages to any Powers, would it not assuredly be to the weakest?"

"Yesterday, in the Comité d'Examen, I spoke in the same strain to my opposing colleagues. Is not every establishment of a tribunal, every triumph of an impartial and well-considered decision over warring interests and passions, one more safeguard for the weak against the abuses of power?"

"Gentlemen, what is now the rule among individual men will hereafter obtain among nations. Such international institutions as these will be the protection of the weak against the powerful. In the conflicts of brute force, where fighters of flesh and with steel are in line, we may speak of great Powers and small, of weak and of mighty. When swords are thrown in the balance, one side may easily outweigh the other. But in the weighing of rights and ideas disparity ceases, and the rights of the smallest and the weakest Powers count as much in the scales as those of the mightiest.

"This conviction has guided our work, and throughout its pursuit our constant thought has been for the weak. May they at least understand our idea, and justify our hopes, by joining in the effort to bring the future of Humanity under the majesty of the Law.<sup>1</sup>

<sup>1</sup> Conférence Internationale de la Paix, 1899, part IV, Third Commission, pp. 56-57; Holls' Peace Conference, pp. 273-275.



Although heartily in favor of the article, the American delegation was in an embarrassing position; for non-intervention in European affairs, and the refusal to permit European intervention in American affairs, have been a cardinal point of American diplomacy. To quote again Mr. White's Diary, under date of July 24:

For some days—in fact, ever since Captain Mahan on the 22d called attention to Article 27 of the arbitration convention as likely to be considered an infringement of the Monroe Doctrine—our American delegation has been greatly perplexed. We have been trying to induce the French, who proposed Article 27, and who are as much attached to it as is a hen to her one chick, to give it up, or, at least, to allow a limiting or explanatory clause to be placed with it. Various clauses of this sort have been proposed. The article itself makes it the duty of the other Signatory Powers, when any two nations are evidently drifting toward war, to remind these two nations that the arbitration tribunal is open to them. Nothing can be more simple and natural; but we fear lest, when the convention comes up for ratification in the United States Senate, some over-sensitive patriot may seek to defeat it by insisting that it is really a violation of time-honored American policy at home and abroad—the policy of not entangling ourselves in the affairs of foreign nations, on one side, and of not allowing them to interfere in our affairs, on the other.<sup>1</sup>

And under date of July 25:

All night long I have been tossing about in my bed and thinking of our declaration of the Monroe Doctrine to be brought before the conference today. We all fear that the conference will not receive it, or will insist on our signing without it or not signing it at all.<sup>2</sup> . . . .

In the afternoon to the House in the Wood, where the Final Act was read. . . . We had taken pains to see a number of the leading delegates, and all, in their anxiety to save the . . . arbitration plan, agreed that they would not oppose our declaration. It was therefore placed in the hands of Raffalovitch, the Russian secretary, who stood close beside the president, and as soon as the Final Act had been recited he read this declaration of ours. This was then brought before

<sup>1</sup> Andrew D. White's Autobiography, Vol. II, p. 339.

<sup>2</sup> Ibid., p. 340.

the Conference in plenary session by M. de Staal, and the Conference was asked whether any one had any objection, or anything to say regarding it. There was a pause of about a minute, which seemed to me about an hour. Not a word was said,—in fact, there was dead silence,—and so our declaration embodying a reservation in favor of the Monroe Doctrine was duly recorded and became part of the proceedings.

Rarely in my life have I had such a feeling of deep relief; for, during some days past, in has looked as if the arbitration project, so far as the United States is concerned, would be wrecked on that wretched little Article 27.<sup>1</sup>

In regard to Article 55, the instructions of the American delegation required that a revision of the arbitral award, pronounced by the arbitration tribunal, should be subject to revision.<sup>2</sup>

M. de Martens, with a very respectable following, insisted that an arbitral decision should be accepted as final, even although wrong; whereas Mr. Holls, on behalf of the American delegation, contended, and rightly, that the fundamental purpose of the court was to ascertain and administer justice; that a miscarriage of justice would prejudice the court, and that the surest means to settle a controversy finally was by a judgment, the justice of which could not be successfully attacked. After prolonged discussions in the sub-committee, and in the commission, Article 55 was adopted as it now stands, giving the parties the right to reserve, in the agreement of arbitration, a re-hearing of the case.<sup>3</sup>

It thus appears that the crisis was passed, when Germany accepted the Permanent Court of Arbitration, and the various discussions set forth at length serve to show what may be accomplished when a conference is animated by a spirit of compromise and conciliation in the accomplishment of a noble work.

Reserving for subsequent consideration the convention for

<sup>1</sup> Ibid., 341.

<sup>2</sup> Instructions to the International (Peace) Conference at The Hague, 1899, Annex B, Section 7. See Vol. II, p. 16.

<sup>3</sup> See Conférence Internationale de la Paix, 1899, part IV, Third Commission, pp 26-31.

the pacific adjustment of international disputes, it is sufficient for the present purpose to say that it recognizes and defines the use of good offices and mediation before or during war, with or without the request of the contending powers; that it created an international commission of inquiry by means of which nations in controversy can ascertain the facts in dispute; that it provided a permanent panel of judges from which a temporary tribunal could be formed for the application of law to an international controversy and drafted a code of arbitral procedure for the guidance of the tribunal when formed.

In order to put in appropriate form the various conventions and declarations voted by the commissions, there was appointed an editing committee, and from its members a subcommittee was selected to give to the measures already approved final form and precision. The committee reported to the Conference the result of its labors, and, adopted and approved, the various measures were given the clearness and precision necessary for international agreements.

There is one important act not previously mentioned, namely, the Final Act. This sets forth the calling of the Conference, enumerates the powers invited and present, states the conventions, the declarations, the resolution, and the six recommendations or *vœux* which the Conference addressed to the Signatory Powers for discussion either by negotiation or at a succeeding conference. The Final Act, therefore, is the authoritative résumé of the work actually accomplished by the Conference, and as such it may be quoted in full in order to show the positive results achieved by this First International Conference, summoned without a preceding war, and whose work will always be a landmark in international law.

The International Peace Conference, convoked in the best interests of humanity by His Majesty the Emperor of All the Russias, assembled, on the invitation of the Government of Her Majesty, the Queen of the Netherlands, in the Royal House in the Wood at The Hague, on the 18th May, 1899.

The Powers enumerated in the following list took part in

the Conference, to which they appointed the Delegates named below:<sup>1</sup>

In a series of meetings, between the 18th May and the 29th July, 1899, in which the constant desire of the Delegates above mentioned has been to realize, in the fullest manner possible, the generous views of the august Initiator of the Conference and the intentions of their Governments, the Conference has agreed, for submission for signature by the Plenipotentiaries, on the text of the Conventions and Declarations enumerated below and annexed to the present Act:

In a series of meetings, between the 18th May and the 29th July, 1899, in which the constant desire of the Delegates above mentioned has been to realize, in the fullest manner possible, the generous views of the august Initiator of the Conference and the intentions of their Governments, the Conference has agreed, on the text of the Conventions and Declarations enumerated below and annexed to the present Act:

I. Convention for the peaceful adjustment of international differences.

II. Convention regarding the laws and customs of war by land.

III. Convention for the adaptation to maritime warfare of the principles of the Geneva Convention of the 22d August, 1864.

IV. Three Declarations:

1. To prohibit the launching of projectiles and explosives from balloons or by other similar new methods.

2. To prohibit the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases.

3. To prohibit the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core, or is pierced with incisions.

These Conventions and Declarations shall form so many separate Acts. These Acts shall be dated this day, and may be signed up to the 31st December, 1899, by the Plenipotentiaries of the Powers represented at the International Peace Conference at the Hague.

Guided by the same sentiments, the Conference has adopted unanimously the following Resolution:

"The Conference is of opinion that the restriction of military charges, which are at present a heavy burden on the world, is extremely desirable for the increase of the material and moral welfare of mankind."

It has, besides, formulated the following wishes:

1. The Conference, taking into consideration the preliminary steps taken by the Swiss Federal Government for the revi-

<sup>1</sup> For the names of the delegates, see Vol. II, pp. 63-77.



sion of the Geneva Convention, expresses the wish that steps may be shortly taken for the assembly of a Special Conference having for its object the revision of that Convention.

This wish was voted unanimously.

2. The Conference expresses the wish that the questions of the rights and duties of neutrals may be inserted in the program of a Conference in the near future.

3. The Conference expresses the wish that the questions with regard to rifles and naval guns, as considered by it, may be studied by the Governments with the object of coming to an agreement respecting the employment of new types and calibers.

4. The Conference expresses the wish that the Governments, taking into consideration the proposals made at the Conference, may examine the possibility of an agreement as to the limitation of armed forces by land and sea, and of war budgets.

5. The Conference expresses the wish that the proposal which contemplates the declaration of the inviolability of private property in naval warfare, may be referred to a subsequent Conference for consideration.

6. The Conference expresses the wish that the proposal to settle the question of the bombardment of ports, towns, and villages by a naval force may be referred to a subsequent Conference for consideration.

The last five wishes were voted unanimously, saving some abstentions.

In faith of which, the Plenipotentiaries have signed the present Act, and have affixed their seals thereto.

Done at The Hague, 29th July, 1899, in one copy only, which shall be deposited in the Ministry for Foreign Affairs, and of which copies, duly certified, shall be delivered to all the Powers represented at the Conference.

With the signing of the Final Act and the various declarations, which took place on July 29, the labors of the First Peace Conference closed. It was generally known that Holland had wished the Papacy to be represented at the conference. Opposition from influential quarters prevented the realization of this desire, but the Dutch Government requested that a telegram informing the Pope of the convocation of the conference, and his reply be read and spread upon the minutes of the conference.<sup>1</sup> This was accordingly done at the Final Session,

<sup>1</sup> Conférence Internationale de la Paix, 1899, part I, Plenary Session, pp. 163-164. The following account of the incident is taken from Dr. White's Autobiography, Vol. II, pp. 349-350.

"There was one proceeding at the final meeting of the conference which



after which President de Staal pronounced an admirable closing address.<sup>1</sup>

This address opened with a tribute of gratitude to the Queen of the Netherlands for the hospitality extended to the Conference and an expression of thanks to the statesmen and jurists who presided over the labors of the committees and sub-committees, to the reporters and the secretary, and finally to the delegates. In briefly reviewing the labors of the Conference, he said that the failure to reach material results on the subject of the limitation of armaments and budgets was due to the technical difficulties which the commission was not competent to consider, but that the Conference itself had asked the various Governments to take up anew the consideration of these themes; that the Conference had accepted the humanitarian proposals for the extension to maritime warfare of the application of principles analogous to those which form the object of the Geneva Convention and had given more definite definite form to the laws and customs of war on land. He

I have omitted, but which really ought to find a place in this diary. Just before the final speeches, to the amazement of all and almost to the stupefaction of many, the president, M. de Staal, handed to the secretary, without comment, a paper which the latter began to read. It turned out to be a correspondence which had taken place, just before the conference between the Queen of the Netherlands and the Pope.

"The Queen's letter—written, of course, by her ministers, in the desire to placate the Catholic party, which holds the balance of power in the Netherlands—dwelt most respectfully on the high functions of his Holiness, etc., etc., indicating, if not saying, that it was not the fault of her government that he was not invited to join in the conference.

"The answer from the Pope was a masterpiece of Vatican skill. In it he referred to what he claimed was his natural position as a peacemaker on earth, dwelling strongly on this point.

"The reading of these papers was received in silence, and not a word was publicly said afterward regarding them, though in various quarters there was very deep feeling. It was felt that the Dutch Government had taken this means of forestalling local Dutch opposition, and that it was a purely local matter of political partisanship that ought never to have been intruded upon a conference of the whole world."

For the Pope's masterly reply, see *Conférence Internationale de la Paix*, 1899, part I, Plenary Session, p. 164. For Dr. White's comment upon it, see *Autobiography*, Vol. II, pp. 351-353.

<sup>1</sup> *Conférence Internationale de la Paix*, 1899, part I, pp. 164-166.

called especial attention to the adoption of the Convention for the pacific adjustment of international differences, and in this connection said:

Some years ago, in bringing to a close the arbitration on the Behring Sea matter, an eminent French diplomat expressed himself as follows: "We have tried to maintain intact the fundamental principles of that august International Law which stretches like the dome of heaven above all nations, and which borrows the laws of nature herself to protect the peoples of the earth one from another, in teaching them the necessities of mutual good will."

The Peace Conference, with the authority which attaches to an Assembly of civilized nations, has tried also to safeguard, in questions of prime interest, the fundamental principles of International Law. It took for its task their definition, their development, and their more complete application. It has created, on several points, new laws answering to new necessities, to the progress of international life and the exigencies of public conscience, and to the best aspirations of humanity. Veritably it has accomplished a work which the future will call, no doubt, The First International Code of Peace, and to which we have given the more modest name of Convention for the Peaceful Adjustment of International Differences.

Continuing he said that the task accomplished by the conference in the particular elements of its endeavor, namely, the realization of progress in regard to mediation and arbitration, was truly beautiful and meritorious.

"No doubt," he remarked, "that work is imperfect, but it is sincerely practical and wise. It tries to consolidate, while safeguarding both the two principles which are the foundation of International Law—the principle of sovereignty of individual States, and the principle of a just international comity. It gives precedence to that which unites over all which divides. It affirms that in the new era upon which we are entering the dominant factor should be good works, arising from the necessity of concord, and made fruitful by the coöperation of States seeking the realization of their legitimate interests in solid peace, regulated by justice."

Concluding his address, he said:

At the present time, it is perhaps premature to judge as a whole the work which has hardly been brought to a close. We are, as yet, too near its origin; we lack the birdseye view.

What is certain is, that this work will develop in the future; and, as the President of our Third Commission said, on a memorable occasion: "The further we advance on the road of time, the more clearly will its importance appear." Gentlemen, the first step is taken. Let us unite our efforts, and profit from experience. The good seed is sown; let us await the harvest.

## CHAPTER III

### GENERAL SURVEY OF THE SECOND PEACE CONFERENCE

#### 1. THE CALL OF THE CONFERENCE

The small wits have busied themselves with the fact that the adjournment of the First Conference was followed by the prolonged and questionable war in South Africa, and that the august initiator of the Conference, unwilling to reduce his armaments by land or sea, or to resort to the convention for the peaceful settlement of international disputes, which his conference adopted, rushed headlong and madly into a war of conquest with Japan. Nor was the fact unnoted that Japan absorbed the hermit kingdom of Korea shortly before the meeting of the Second Conference, and that during the very sessions of this august assembly, France was employing influences somewhat stronger than moral suasion in Morocco. The question was often asked in familiar conversation at The Hague, Which of the States will be the first to resort to war? And inasmuch as Russia, the initiator of the First Conference, was plunged into warfare within a few years after its adjournment, it was suggested that the United States, the real initiator of the Second Conference, might succumb to the same fatality and in practice disavow its peaceful professions. Those who will may find humor in the situation.

It is an unfortunate fact that these wars were not prevented by good offices, mediation, or the system of arbitration created by the First Conference; but we must never forget that each nation must determine for itself its political policy, and that, while it may yield to good offices and mediation, arbitration is primarily for the solution of legal questions, that is to say, questions susceptible of judicial interpretation or decision. Ques-

tions of foreign policy, based solely upon political hopes and aspirations, do not lend themselves easily to arbitration, and the desire of Great Britain to control the future of South Africa, as well as the ambition of Russia to possess an ice-free port to the south of Vladivostock, even at the expense of Korea, involve moral as well as political considerations.

It is beside the present purpose to determine whether these questions might have been settled peaceably. It is sufficient to state that in 1904-1905 Russia found itself involved in a great and unsuccessful war with Japan, which impaired its prestige abroad and which threatened its peace at home.

The First Conference had in mind a successor, but the years were slipping by and the friends of progress and therefore of peace, became anxious lest the Conference of 1899 might stand as an isolated experiment, and the hopes created by its meeting be defeated, or their realization indefinitely postponed. Private discontent took public form and expression, and slowly but surely public opinion began to influence those whom we are accustomed to call in our country "the servants of the people." In 1903, the American Peace Society presented to the Massachusetts Legislature a petition for a stated international congress,<sup>1</sup> and this body in 1903, true to its traditions of 1837 and 1838, unanimously passed the following resolutions:

*Resolved*, That the Congress of the United States be requested to authorize the President of the United States to invite the governments of the world to join in establishing, in whatever way they may judge expedient, a regular international congress to meet at stated periods to deliberate upon the various questions of common interest to the nations and to make recommendations thereon to the governments.

*Resolved*, That a copy of these resolutions be sent to the senior senator and the senior representative of Massachusetts in Congress to be presented in their respective branches.

In support of the petition of the American Peace Society, a memorial was presented to the Senate and House of Representatives of the United States, relative to the establishment of

<sup>1</sup> For the text of this important document, with its imposing list of international conferences, see Appendix, pp. 754-758.



an international congress, signed by the Attorney-General and all the justices of the Supreme Court of Pennsylvania, and endorsed by the Governor of the State. In the year 1904, the United States celebrated the peaceful acquisition of the territory embraced in the Louisiana Purchase, and at the meeting of the Interparliamentary Union held in St. Louis, September 13, 1904, under the presidency of Honorable Richard Bartholdt, upon motion of the Honorable Theodore E. Burton, of Ohio, and seconded by Count Apponyi, of Hungary, Dr. Albert Gobat, of Switzerland, Dr. G. B. Clark, of Great Britain, the Marquis, San Guiliano, of Italy, and Honorable Philip Stanhope, of Great Britain, the following resolutions were unanimously adopted:

WHEREAS, Enlightened public opinion and the spirit of modern civilization demand that differences between nations be settled in the same manner as controversies between individuals—that is, through courts of justice and in conformity with well-recognized principles of law,—therefore

The Conference asks that the different Powers of the entire world delegate representatives to an international conference which shall meet at a time and place to be designated by them to deliberate upon the following questions:

- (a) The subjects postponed by the Hague Conference;
- (b) The negotiation of arbitration treaties between the nations which shall be represented in this conference;
- (c) The establishment of an international congress which shall meet at stated periods to discuss international questions;

And decides to request respectfully and urgently the President of the United States to invite all the nations to send representatives to such a conference.<sup>1</sup>

The resolutions were presented formally by Dr. Gobat to President Roosevelt, who immediately and without reserve pledged himself to the furtherance of the great cause:

In response to your resolutions, I shall at an early date ask the other nations to join in a second congress at The Hague. I feel, as I am sure you do, that our efforts should take the shape of pushing forward toward completion the work already begun at The Hague and that whatever is now done should

<sup>1</sup> *Compte Rendu of the Interparliamentary Union for 1904*, p. 42.

appear not as something divergent therefrom, but as a continuance thereof.<sup>1</sup>

President Roosevelt is primarily a man of action and no sooner did he give his promise than he set to work to fulfill it. On the twenty-first day of October, 1904, the late Mr. John Hay, then Secretary of State, addressed a circular note to the representatives of the United States accredited to the governments signatory to the acts of The Hague Conference of 1899.

The note reminded the Signatory Governments of the great work accomplished by the Conference of 1899 and the important subjects bequeathed by it to its successor for discussion.<sup>2</sup> An encomium upon the achievements of the Interparliamentary Union was followed by the resolutions adopted at the conference held in St. Louis in 1904. After expressing the President's acceptance of the trust offered him by the Interparliamentary Union, the embarrassment attendant upon inviting the Powers to a peace conference at a time when a great war was in progress was shown to be more apparent than real by citing the calling of the First Conference during the Spanish-American War and explaining that the efforts of the Conference would lie in the direction of making more remote the chances of future wars. With these introductory remarks, the President directed that it be ascertained to what extent the Powers were disposed to act in the matter. As to the character of the questions to be brought before the Second Peace Conference, the statement was made that it seemed premature to couple the tentative invitation with a categorical program of subjects; but the importance of the questions relegated to a future conference by

<sup>1</sup> *Compte Rendu*, p. 61. In the message to Congress, dated December 5, 1904, President Roosevelt makes the following statement of the action taken by him in initiating the Second Peace Conference at The Hague:

"Furthermore, at the request of the Interparliamentary Union, an eminent body composed of practical statesmen from all countries, I have asked the Powers to join with this government in a Second Hague Conference, at which it is hoped that the work already so happily begun at The Hague may be carried some steps further toward completion."

<sup>2</sup> For text of the note, see Vol. II, pp. 168-172.

the Conference of 1899, namely, the rights and duties of neutrals, the inviolability of private property in naval warfare, and the bombardment of ports, towns and villages by a naval force, was suggested. A suggestion was also made as to the desirability of considering and adopting a procedure by which States non-signatory to the original acts of The Hague Conference could become adhering parties. It was explained that the overture for a second conference was not designed to supersede other calls for the consideration of special topics.

Finally, you will state the President's desire and hope that the undying memories which cling around The Hague as the cradle of the beneficent work which had its beginning in 1899 may be strengthened by holding the Second Peace Conference in that historic city.

The responses to this note were favorable. They indicated that the proposal was generally accepted in principle by the Governments of Austria-Hungary, Denmark, France, Germany, Great Britain, Italy, Luxemburg, Mexico, the Netherlands, Portugal, Roumania, Spain, Sweden and Norway, and Switzerland, with a reservation in most cases of future consideration of the date of the Conference and the program of subjects for discussion. The reply of Russia deferred the participation of that Government until the cessation of hostilities in the Far East, while Japan made the reservation only that no action should be taken by the Conference relative to the war. These results were embodied in a second circular note, dated December 16, 1904, to the representatives of the United States.<sup>1</sup> This second note stated that, pending a definite agreement for meeting, it seemed desirable that a comparison of views should be had among the participants as to the scope and nature of the subjects to be brought before the Second Conference. The United States, however, was still unwilling to outline a program other than the general topics suggested in the first note, as it seemed that the President had already accomplished this purpose by securing the general acceptance of his invita-

<sup>1</sup> For text of the note, see Vol. II, pp. 172-174.

tion for a second conference. It was suggested that, in view of the virtual certainty that The Hague would be the meeting place of the Second Conference, and in view of the fact that an organized representation of the signatories of the acts of 1899 already existed at that capital, the interchange of views should be effected through the International Bureau under the control of the Permanent Administrative Council of The Hague, as in this way an orderly treatment of the preliminary consultations would be insured, and the way left clear for the calling, by the Government of the Netherlands, of a renewed conference at The Hague.

It was, therefore, no empty compliment, but a solemn statement of historical fact, when the Second Conference stated in the opening phrases of its Final Act, that the Second Peace Conference at The Hague was proposed in the first instance by the President of the United States of America.

The next step in historical sequence is the conclusion of the Russo-Japanese War by the treaty of Portsmouth, signed September 5, 1905, brought about by the good offices of President Roosevelt. This happy event restored peace to the Russian Empire, and allowed the Czar to carry out the measures of international peace with which his name is indissolubly associated. The preliminary steps for the holding of the Second Conference had been taken by President Roosevelt, and nothing remained but the issuance of the call and the arrangement of the details incident to the meeting of a conference. The Czar had not only called, but conceived the idea of the First Conference, and it was as natural as it was desirable that he should call into being for the second time an institution due to his generous and high-minded activity. The Russian Ambassador therefore waited upon President Roosevelt, and stated that Russia was ready to assume the responsibility of summoning the Second Conference, and, with the chivalry characteristic of our President, he gladly renounced to Russia the honor.<sup>1</sup>

<sup>1</sup> Memorandum presented to the President by the Russian Ambassador:  
September 13, 1905.

In view of the termination, with the cordial coöperation of the President of the United States, of the war and of the conclusion of peace between



Mr. Root's memorandum to the Russian Ambassador, dated October 12, 1905, briefly but adequately setting forth the successive steps by which the Second Conference was proposed and the transfer of the initiative to Russia may well conclude the preliminaries to the official call of the Conference:

The Secretary of State, by direction of the President, has the honor to confirm to His excellency the ambassador of Russia the assurances which the President had the sincere pleasure to give to his excellency at the time of the presentation of the memorandum of September 13. The President's circulars to the powers parties to the acts of The Hague Conference, which the late Secretary of State communicated to the several signatory states through the American envoys accredited thereto, dated, respectively, October 21 and December 16 of last year, have demonstrated the President's keen desire that upon a favorable occasion the labors of the First International Peace Conference might be supplemented and completed by an accord to be reached by a second conference of the powers. The suggestion so put forth having been accepted in principle by the signatories, it only remained for the opportune moment to come for the powers to agree upon the place and time for their renewed assemblage in order to perfect the beneficial agreements of the first conference.

The President most gladly welcomes the offer of His Imperial Majesty to again take upon himself the initiation of the steps requisite to convene a second international peace conference, as the necessary sequence to the first conference, brought about through His Majesty's efforts, and in view of the cordial responses to the President's suggestion of October, 1904, he doubts not that the project will meet with complete

Russia and Japan, His Majesty the Emperor, as initiator of the International Peace Conference of 1899, holds that a favorable moment has now come for the further development and for the systematizing of the labors of that international conference. With this end in view, and being assured in advance of the sympathy of President Roosevelt, who has already last year pronounced himself in favor of such a project, His Majesty desires to approach him with a proposal to the effect that the Government of the United States take part in a new international conference which could be called together at The Hague as soon as favorable replies could be secured from all the other States to whom a similar proposal will be made. As the late war has given rise to a number of questions which are of the greatest importance and closely related to the acts of the First Conference, the plenipotentiaries of Russia at the future meeting will lay before the conference a detailed program which could serve as a starting point for its deliberations.—Foreign Relations, 1905, p. 829.



acceptation and that the result will be to bring the nations of the earth more closely together in their common endeavor to advance the ends of peace.

As respects the further statement of his excellency's memorandum of September 13, that, as the late war has given rise to a number of questions which are of the greatest importance and closely related to the acts of the first conference, the plenipotentiaries of Russia, at the future meeting, will lay before the conference a detailed program which could serve as a starting point for its deliberations, the President finds it in consonance with the indications of his circular of October 21, 1904, touching the questions to come before a second conference for discussion, and the importance of completing the work of the first conference by ample exchange of views and, it is to be hoped, full concord upon the broad questions specifically relegated by the Final Act of The Hague to the consideration of a future conference.<sup>1</sup>

## 2. INVITATION TO LATIN-AMERICA

In the First Commission of the First Conference, M. Beernaert finely declared that

In the history of the world, this is the first time I believe that we have seen representatives of almost the whole of the civilized world meet,—in profound peace, without a conflict to be settled, or without wrongs to be redressed, without any preoccupation or personal advantage,—with the twofold and generous mission to perpetuate harmony, and to ameliorate the evils of war, or to regulate it for the day in which it can not be avoided.<sup>2</sup>

It will be remembered, however, that the First Conference represented only a fraction of the civilized States of the world acknowledging and applying the principles of international law, and that Latin-America was unrepresented in the conference, unless Mexico be regarded as its representative.<sup>3</sup> The United States

<sup>1</sup> Foreign Relations, 1905, pp. 29–30.

<sup>2</sup> Conférence Internationale de la Paix, 1899, part, II, First Commission, p. 2.

<sup>3</sup> Brazil seems to have been invited to the First Conference, a fact called to the attention of the Second Conference by M. Ruy Barbosa in the expressions of gratitude to the Czar for initiating the Conference: "La Délégation de Brésil s'empresse d'adhérer à cet acte de gratitude et de justice, d'autant plus volontiers qu'il répond, en même temps, de notre part à

has always felt a keen interest in the sister republics of the Western hemisphere, and from the establishment of their independence to the present day, it has sought at critical times, by counsel and good offices, to protect them in the enjoyment of their just rights. The Monroe Doctrine, made the subject of criticism, has been regarded, in many quarters, as a manifesto of leadership in American affairs; but in its origin, in its spirit, and in its application, it has sought to protect—never to subject—the American republics. The United States has entered into numerous treaties with Latin-America, and on three recent historical occasions Pan-America has assembled to discuss matters of interest common to the Latin as well as to the Anglo-Saxon. The Pan-American Conference held in Washington in 1889–1890, due to the wise and farseeing statesmanship of Mr. James G. Blaine,<sup>1</sup> the Pan-American Conference held in Mexico in 1901–1902, the third conference held at Rio de Janeiro in 1906, showed at once the importance and the solidarity of American interests.

The United States, therefore, was unwilling to participate in an international conference at The Hague which did not include as of right all of the American States; and inasmuch as the Pan-American Conference was in session at Rio de Janeiro in the summer of 1906, the United States insisted that The Hague Conference should not meet at a conflicting period, but at

une dette spéciale de reconnaissance envers le Souverain auquel mon pays a dû l'honneur d'être invité à la Première Conférence de la Paix."—La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, vol. I, p. 171.

Dr. White reports the substance of a conversation with a European colleague:

"On my asking why Brazil, though represented at St. Petersburg, was not invited, he answered that Brazil was invited, but showed no desire to be represented. On my asking him if he supposed this was because other South American powers were not invited, he said that he thought not; that it was rather its own indifference and carelessness, arising from the present unfortunate state of government in that country. On my saying that the Emperor Dom Pedro, in his time, would have taken the opportunity to send a strong delegation, he said: 'Yes; he certainly would have done so.'"—Autobiography, Vol. II, p. 284.

<sup>1</sup>For Mr. Blaine's note, dated November 29, 1881, proposing a Pan-American Conference, see Appendix, pp. 751–754.

such time as the American States could be conveniently represented without interfering with the international conference of the western world. And, in the next place, the United States was unwilling that the two conferences, meeting at one and the same time or approximately at one and the same time, might seem to compete in importance, or that the meeting of one should detract in interest from the meeting of the other. As is well known and stated in the Final Act, the Conference met at The Hague on the fifteenth day of June, 1907.

But it was not only essential that Latin-America should be represented at the Conference, but also that Latin-America should be given an opportunity to adhere to the conventions of the First Conference; otherwise, the powers represented at the First and at the Second Conference would not stand upon that equality which is the essence of diplomatic representation.

Two of the conventions, namely, the convention concerning the laws and customs of war, and the application of the principles of the Geneva Convention to maritime warfare, were open conventions; that is to say, they provided in express terms for the subsequent adherence of non-represented States which were willing to accept the responsibilities along with the advantages of the conventions. But the first convention for the peaceful adjustment of international differences is, to use a technical expression, a "closed convention;" for the Signatories treated it as a contract binding the parties to it, and therefore, by the law of contracts, of no effect upon those who were not contracting parties. Accepting the contract theory as correct, it might follow that A and B were willing to enter into contract with C and D, but they might be unwilling to extend the benefits of the contract to X, Y, and Z.

Article 59 of the convention stipulated that non-signatories might adhere to it, and that they should express their desire by a written notification addressed to the Dutch Government, and communicated by it to the other contracting powers; but as some of these latter might object to extending the benefits of the convention to the non-signatories, it was provided in Article 60 that the conditions of adherence to the preceding

convention should form the object of a subsequent agreement between the contracting powers. Through the good offices of the United States, all the Latin-American States were invited to the Conference, and through the initiative of the United States, the formula of adherence was devised. The correspondence on these points is of sufficient interest to justify its quotation. In a note, dated April 6, 1906, to Baron Rosen, Russian Ambassador at Washington, Mr. Root said:

I have great pleasure in acknowledging the receipt of your note of the 3d instant [April 3, 1906], whereby you acquaint me with the instructions telegraphed to you by your Government to inform the Government of the United States that, in concert with the Dutch Government, it is proposed to convoke the Conference of The Hague during the first half of the month of July of the present year. . . .

It behooves me, however, to say that, in the judgment of the President, the date suggested by the Imperial and the Dutch Governments for the assembling of the Conference would be in a high degree embarrassing and inconvenient, not only to the United States but doubtless also to many other nations of the American hemisphere, owing to the fact that the 21st of July next has long been fixed for the meeting of the conference of all the American nations at Rio de Janeiro. Furthermore, so early a date as the first half of July does not appear to be conformable to the understanding arrived at in respect to the Red Cross Congress to be held at Geneva in mid-June, which would manifestly not have an opportunity to complete its work in season for consideration and action by the participating governments before the time proposed for the meeting at The Hague. For these reasons, as well as for other practical considerations in regard to the difficulty that would beset the several governments taking part in these three important conferences at the same season, both as to their representation thereat and as to the need of preserving a consistent harmony in the discussion of the allied topics which would necessarily come before the three conferences, the President is constrained to say, in all frankness, that so early a date as is proposed for the meeting of the Conference of The Hague appears to be extremely inexpedient; and that he would be obliged to say so in response to the formal joint invitation of the Imperial and Dutch Governments which is foreshadowed in your announcement of their intended proposal. As your note merely intimates the proposal of those two Governments to act in concert in the indicated sense, it is assumed that the present purpose of the



Imperial Government is to invite the general acquiescence of the interested powers in the contemplated proposal in advance of the later communication of the formal invitation; hence it is proper to acquaint the Imperial Government with the views of the United States in the matter of the date to be agreed upon.

I take note of the further statement that "Russia at the same time invites the nations which did not sign the convention relative to the laws of war on land, nor that relative to the adaptation of the Geneva Convention to war at sea, to inform the Royal Government of the Netherlands of their adhesion to these conventions. With regard to further adhesions to the convention concerning international arbitration, the Imperial Government is conferring on this subject with the governments which signed the acts of 1899."

As respects the latter proposition, the President has already, in the circulars of the Secretary of State dated October 21 and December 16, 1904, advocated the extension of the option of adherence to powers not represented at the conference of 1899, and he will welcome the suggested comparison of views looking to the conclusion of an agreement among the contracting powers in that sense, as contemplated by Article 60 of the First Hague Convention of 29 July, 1899.

The United States, being already an adhering party to the conventions mentioned, would gladly see other nations, not heretofore signatories or adherents, become in like manner parties to the beneficent engagements which were framed by the First Conference of The Hague and to which the approaching second conference may rightly be expected to give wide scope and more effective application in the light of recent military developments and in view of the practical needs suggested by experience.<sup>1</sup>

The Russian Government proposed, in its note of April 12, 1906, that, on the opening of the Second Conference, the representatives of the States, parties to the First Conference, sign the following protocol:

The representatives at the Second Peace Conference of the states signatories of the Convention of 1899 relative to the peaceful settlement of international disputes, duly authorized to that effect, have agreed that in case the states that were not represented at the First Peace Conference, but have been convoked to the present conference, should notify the Government of the Netherlands of their adhesion to the above-mentioned

<sup>1</sup> MS. Records, Department of State.



convention they shall be forthwith considered as having acceded thereto."

In reply, Mr. Root hastened to say that

the Government of the United States cheerfully gives its assent to the course proposed in the said note for permitting the adhesion to the convention for the pacific settlement of international disputes, in accordance with Article 60 of that convention, on the part of the powers which did not take part in the first conference at The Hague.

It is the understanding of the United States that should the other powers who took part in that conference assent to the proposal of your note of April 12, that assent in itself will have the effect of making it certain that the adhesion of the powers which did not take part in the first conference will be accepted, so that their representatives can go to the second conference without feeling that there is any uncertainty as to whether they can take full part in the conference.<sup>1</sup>

The Latin-American States complied with the formalities of the protocol of adherence; the protocol of adherence was signed at The Hague on June 14, 1907, and Latin-America became entitled to admission upon a footing of absolute equality. The result of these negotiations meant, in simplest terms, an international assembly composed not merely of the select few, but of all the States<sup>2</sup> at the present time accepting and applying in their international relations the recognized principles of international law.<sup>3</sup>

<sup>1</sup> Mr. Root's note, dated April 19, 1906, to Baron Rosen; MS. records of the Department of State.

<sup>2</sup> See List of States with Comments, Vol. II, pp. 179-180.

<sup>3</sup> For important texts concerning the admission of Latin-America to the Second Hague Peace Conference, the protocol consenting to the adherence and the protocol of adherence, see Appendix. pp. 758-770, and Vol. II, pp. 252-255.

The records of the Department of State show with what zeal and fidelity the United States executed the mandate to secure the admission of Latin-America to the privileges of the convention for the peaceful settlement of international disputes. The documents set forth in the text and in the Appendix, and the manuscript records of the Department testify to the desire of the United States to secure the admission of the American Republics upon a plane of equality to the deliberations of the Second Hague Peace Conference.

### 3. THE PROGRAM AND RESERVATIONS OF CERTAIN POWERS

It is now necessary to consider another preliminary of great importance, namely, the program to be presented to the Conference, which should form the basis of discussion and eventual agreement.

In the circular letter of October 21, 1904, the United States indicated that

it would seem premature to couple the tentative invitation thus extended with a categorical program of subjects of discussion. It is only by comparison of views that general accord can be reached as to matters to be considered by the new conference. . . . Among the broader general questions affecting the right and justice of the relation of sovereign states, which were then relegated to a future conference, were: the rights and duties of neutrals, the inviolability of private property in naval warfare; and the bombardment of ports, towns, and villages by naval force. The other matter mentioned in the Final Act take the form of suggestions for consideration by interested governments.<sup>1</sup>

In the circular note of December 16, 1904, the United States again declared that

"the invitation put forth by the Government of the United States did not attempt to do more than indicate the general topics which the Final Act of the first conference at The Hague relegated, as unfinished matters, to consideration by a future conference. . . . In the present state of the project, this Government is still indisposed to formulate a program," and "that it should not assume the initiative in drawing up a program, nor preside over the deliberations of the signatories in that regard."<sup>2</sup>

The attitude of the United States was that the program presented should be the result of conference and discussion, and that it should represent the agreement of *all* powers, rather than the suggestion or dictation of any *one* power. In a note dated April 3, 1906, the Russian Government submitted a tentative program, in acknowledging which, on April 6, Secretary Root reserved consideration of the subjects submitted, "with liberty to advance other proposals of an allied

<sup>1</sup> Vol. II, pp. 170-171.

<sup>2</sup> Ibid., pp. 173-174.

character, should its own needs and experience counsel such a course." A few days later, on April 12, 1906, the Russian Ambassador, Baron Rosen, presented an elaborate, and, as it proved, definitive program:

1. Improvements to be made in the provisions of the convention relative to the peaceful settlement of international disputes as regards the Court of Arbitration and the international commissions of inquiry.

2. Additions to be made to the provisions of the convention of 1899 relative to the laws and customs of war on land—among others, those concerning the opening of hostilities, the rights of neutrals on land, etc. Declarations of 1899. One of these having expired, question of its being revived.

3. Framing of a convention relative to the laws and customs of maritime warfare, concerning—

The special operations of maritime warfare, such as the bombardment of ports, cities and villages by a naval force; the laying of torpedoes, etc.

The transformation of merchant vessels into warships.

The private property of belligerents at sea.

The length of time to be granted to merchant ships for their departure from ports of neutrals or of the enemy after the opening of hostilities.

The rights and duties of neutrals at sea—among others the questions of contraband, the rules applicable to belligerent vessels in neutral ports; destruction, in cases of *vis major*, of neutral merchant vessels captured as prizes.

In the said convention to be drafted, there would be introduced the provisions relative to war on land that would be also applicable to maritime warfare.

4. Additions to be made to the convention of 1899 for the adaptation to maritime warfare of the principles of the Geneva Convention of 1864.

As was the case at the Conference of 1899, it would be well understood that the deliberations of the contemplated meeting should not deal with the political relations of the several states, or the condition of things established by treaties, or in general with questions that did not directly come within the program adopted by the several cabinets.<sup>1</sup>

In reply to the Russian note of April 12, 1906, the Secretary of State, while approving the program, as presented, exercised the liberty reserved in the note of April 6, by suggesting two

<sup>1</sup>For text of the note, see Vol. II, pp. 175-177.

MS. records of the Department of State.

further topics for discussion, namely, the limitation of armaments and the restriction of force in the collection of contract debts. The intrinsic importance of these reservations requires quotation of the material portions of Mr. Root's note of June 7, 1906:

The Government of the United States is, however, so deeply in sympathy with the noble and humanitarian views which moved His Imperial Majesty to the calling of the First Peace Conference that it would greatly regret to see those views excluded from the consideration of the Second Conference.

In the memorandum of August 12, 1898, which accompanied the call for that conference, Count Mouravieff, expressing the sentiment of His Majesty the Emperor, said:

"The maintenance of general peace and a possible reduction of the excessive armaments which weigh down upon all nations present themselves, in the actual present situation of the world, as the ideal toward which should tend the efforts of all governments. . . .

"This conference will be, with the help of God, a happy augury for the century which is about to open. It will gather together in a powerful unit the efforts of all the powers which are sincerely desirous of making triumphant the conception of a universal peace. It will, at the same time, strengthen their mutual harmony by a common consideration of the principle of equity and right, upon which rest the security of states and the well-being of nations."

The truth and value of the sentiments thus expressed are surely independent of the special conditions and obstacles to their realization by which they may be confronted at any particular time. It is true that the First Conference at The Hague did not find it practicable to give them effect, but long-continued and patient effort has always been found necessary to bring mankind into conformity with great ideals. It would be a misfortune if that effort, so happily and magnanimously inaugurated by His Imperial Majesty, were to be abandoned.

This Government is not unmindful of the fact that the people of the United States dwell in comparative security, partly by reason of their isolation and partly because they have never become involved in the numerous questions to which many centuries of close neighborhood have given rise in Europe. They are, therefore, free from the apprehensions of attack which are to so great an extent the cause of great armaments, and it would ill become them to be insistent or forward in a matter so much more vital to the nations of Europe than to them. Nevertheless, it sometimes happens that the very absence of a special interest in a subject enables a nation



to make suggestions and urge considerations which a more deeply interested nation might hesitate to present. The Government of the United States, therefore, feels it to be its duty to reserve for itself the liberty to propose to the Second Peace Conference, as one of the subjects of consideration, the reduction or limitation of armaments, in the hope that, if nothing further can be accomplished, some slight advance may be made toward the realization of the lofty conception which actuated the Emperor of Russia in calling the First Conference.

There is one other subject which it seems to the Government of the United States might well engage the attention of the conference. The subjects already proposed relate chiefly to lessening the evils and reducing the barbarity of war. Important as this is, war will still be cruel and barbarous, and the thing most important is to narrow the cause of war and reduce its frequency. It seems doubtful, in view of the numerous reservations which accompanied the signatures of the powers to the very moderate provisions of the convention for international arbitration agreed upon at the First Conference, whether it will be practicable to secure any very general assent to an agreement for compulsory arbitration without such extensive exceptions as to do away in great measure with its compulsory effect. It does not follow, however, that there may not be agreement upon the rules of conduct which ought to be followed in particular cases out of which controversy is liable to arise; or that these rules, if observed, may not greatly decrease the probabilities of war. The United States feels that it would be well worth while for the powers assembled at the Peace Conference to consider whether such an effect could not be produced by an agreement to observe some limitations upon the use of force for the collection of ordinary public debts arising out of contracts. The United States, accordingly, reserves to itself the liberty to propose this further subject for the consideration of the conference.<sup>1</sup>

In a memorandum presented to the Secretary of State, November 12, 1906, the Russian Ambassador said that if the United States insisted that these two subjects, mentioned in the note of June 7, figure in the program,

it would become necessary to previously consult the views of the powers who have already approved the program as proposed by Russia, as well as those powers who have not yet indicated their views upon the subject.

The Ambassador stated in no uncertain terms that the refusal of one of the great powers to discuss these questions would

<sup>1</sup> MS. records of the Department of State.



render the assembling of the Conference "extremely difficult." The Secretary of State, however, deemed the matter of great importance, and in a note to the Russian Ambassador, dated March 26, 1907, he said:

I beg that you will ask your Government to include in their letter of invitation a statement of the fact of the right of the Government of the United States to propose the matter stated in the reservations made in my note to you on June 7, 1906, namely, the reduction or limitation of armaments, and the attainment of an agreement to observe some limitations on the use of force for the collection of ordinary public debts arising out of contracts.

It would seem that the Secretary of State was not alone in his desire to see subjects of vital interest discussed by the Conference, and that various powers were equally unwilling to submit to a program which limited, without their consent, the discussion of subjects not included in the Russian program. Mr. Root's request that the subjects mentioned in his reservation of June 7, 1906, be communicated to the powers invited, was complied with as appears from the note of the Russian Ambassador, dated March 22/April 4, 1907, which shows the views of the participating powers on the eve of the convocation:

The undersigned, Ambassador of Russia, by order of his Government, has the honor to make the following communication to His Excellency the Secretary of State of the United States:

Before the Second Peace Conference is called, the Imperial Government deems it an obligation to submit to the Powers which have accepted its invitation a statement of the present situation.

All the Powers to which the Imperial Government communicated in April, 1906, its tentative program of the labors of the new Conference have declared their adhesion thereto.

However, the following remarks have been made with respect to that program:

The Government of the United States has reserved to itself the liberty of submitting to the Second Conference two additional questions, viz: the reduction or limitation of armaments

and the attainment of an agreement to observe some limitations upon the use of force for the collection of ordinary public debts arising out of contracts.

The Spanish Government has expressed a desire to discuss the limitation of armaments, reserving to itself the right to deal with this question at the next meeting at The Hague.

The British Government has given notice that it attaches great importance to having the question of expenditures for armament discussed at the Conference, and has reserved to itself the right of raising it. It has also reserved to itself the right of taking no part in the discussion of any question mentioned in the Russian program which would appear to it unlikely to produce any useful result.

Japan is of opinion that certain questions that are not especially enumerated in the program might be conveniently included among the subjects for consideration, and reserves to itself the right to take no part in or withdraw from any discussion taking or tending to take a trend which, in its judgment, would not be conducive to any useful result.

The Governments of Bolivia, Denmark, Greece, and the Netherlands have also reserved to themselves, in a general way, the right to submit to the consideration of the Conference other subjects similar to those that are explicitly mentioned in the Russian program.

The Imperial Government deems it its duty to declare, for its part, that it maintains its program of the month of April, 1906, as the basis for the deliberations of the Conference, and that if the Conference should broach a discussion that would appear to it unlikely to end in any practical issue it reserves to itself, in its turn, the right to take no part in such a discussion.

Remarks similar to this last have been made by the German and Austro-Hungarian Governments, which have likewise reserved to themselves the right to take no part in the discussion by the Conference of any question which would appear unlikely to end in any practical issue.

In bringing these reservations to the knowledge of the Powers and with the hope that the labors of the second Peace Conference will create new guaranties for the good understanding of the nations of the civilized world, the Imperial Government has addressed to the government of the Netherlands a request that it may be pleased to call the Conference for the first days of June.<sup>1</sup>

The invitation referred to in the Russian note, convening the Peace Conference at The Hague on the fifteenth day of June, 1907, was duly received and accepted by the United States.

<sup>1</sup> MS. Records, Department of State.

## 4. OPENING OF THE SECOND CONFERENCE

On Saturday afternoon, June 15, 1907, at 3 o'clock, the members of the Second Peace Conference at The Hague assembled in The Binnenhof in the Hall of Knights, and were called to order by the Dutch Minister of Foreign Affairs, M. Van Tets van Goudriaan, who delivered an address of welcome.

The minister, in the name of the Queen, wished the delegates to the conference welcome and offered to them the hospitality of The Hague. He expressed gratitude toward the initiator of the Conference and toward the President of the United States, who, he said, was largely instrumental in harvesting the seed sown in 1899. Touching upon the severe criticism of the results of the labors of the First Peace Conference, he said:

These judgments, and the events which have occurred, and which according to some pessimistic minds, have furnished a proof of the fruitlessness of the efforts of this Conference, have not seriously weakened the current of opinion which had been formed in favor of the work of the Assembly of 1899.

The best proof that the peoples and their governments, far from disregarding this current of opinion, have been influenced by it, seems to me to be the readiness with which the Powers have responded to the appeal addressed to them.

This reception, he said, which was practically unanimously favorable, was a good omen for the success of the Conference, as was also the increase in the number of nations represented, "for the greater the number of nations participating in the Conference, the more certain the general and unquestioned observance of the measures adopted by them." He explained that the House in the Woods, where the delegates held their meetings in 1899, was not large enough to accommodate so numerous a gathering, but stated that the Hall of Knights, built in the thirteenth century by William II, Count of Holland, King of the Romans, and at present used by the States-General in joint session, seemed worthy of receiving the Second Peace Conference. Minister van Tets then proposed a telegram to

the Emperor of Russia expressing the gratitude of the Conference for continuing the work begun in 1899 and assuring him of its earnest desire to fulfil the task entrusted to it. Unanimous consent was given to his proposition. Finally, the minister proposed, as did his predecessor of 1899, M. de Beaufort, that the first delegate of Russia be selected chairman of the Conference, and with unanimous assent, for there was no nomination or election in the Anglo-American sense of the term, M. de Nelidow assumed the chair.<sup>1</sup>

M. de Nelidow, after thanking the delegates for the honor of the presidency, proposed that M. van Tets van Goudriaan be elected honorary president, and M. de Beaufort, first delegate of the Netherlands, Vice-President, and that a telegram be sent to the Queen of the Netherlands expressing the gratitude of the representatives of the forty-five nations assembled for their gracious reception at the Hague. These propositions were unanimously agreed to, and unanimous approval was also given to his remarks concerning the credit due for the convocation of the Conference to the "eminent chief executive of the great North American federation, whose generous impulses are always inspired by the most noble sentiments of justice and humanity." M. de Nelidow said that this was the first time that the representatives of almost all organized nations were gathered in a single assembly to discuss in common "the dearest interests of humanity, namely, those of conciliation and justice," and he expressed the "hope that the same sentiments of concord which animated the governments will prevail likewise among their representatives and contribute thus to the success of the task devolving upon us."

This task, gentlemen, as outlined in the program of the Conference and accepted by all the governments, is composed of two parts. On the one hand, we are to seek the means of settling in a friendly manner any differences which may arise among the nations, and of thus preventing ruptures and armed conflicts. On the other hand, we must endeavor, if war has

<sup>1</sup>For the text of the address, see *La Deuxième Conférence Internationale de la Paix*, 1907, Actes et Documents, Vol. I, pp. 48-49.



broken out, to mitigate its burdens both for the combatants themselves, and for those who may be indirectly affected. These two problems may have appeared sometimes to be incompatible. When, during the war of secession in the United States, a professor, Dr. Lieber, I believe, had prepared a draft of instructions for the commanders of troops occupying a hostile territory and for the local authorities of the occupied territory, for the purpose of alleviating for both of them the difficulties and burdens of this abnormal situation, I heard the opinion expressed that it was absolutely wrong to seek to mitigate the horrors of war. "In order that wars may be short and rare," I was told, "the peoples waging it must feel its full weight so that they will seek to put an end to it as soon as possible and not desire to resume it." This idea, gentlemen, seems absolutely fallacious to me. The horrors of the struggles of ancient times and of the wars of the Middle Ages did not diminish either their duration or their frequency, whereas the mitigations introduced during the second half of the last century into the methods of warfare and the treatment of prisoners and wounded, as well as the whole series of humanitarian measures which have done honor to the First Peace Conference, and which are to be amplified by the labors of the Conference we are opening, have by no means contributed toward developing a taste for war. They have, on the contrary, disseminated a sentiment of international comity throughout the civilized world, and created a peaceful current which is revealed in the manifestation of approval with which public opinion receives and, as I hope, will continue to receive our labors. We shall, therefore, have to persevere in this regard in the path opened by our predecessors in 1899.

As regards the other part of our task, that relating to the means of preventing and avoiding conflicts among nations, it seems useless to dwell on the services which have already been rendered to the cause of peace and right by the institutions created and the measures adopted by the First Conference. The opinion has been expressed that the differences settled after the First Conference of The Hague did not exceed in importance what might be called international justice-of-the-peace cases. Well, Gentlemen, even justices of the peace render valuable services to public order and tranquillity. They settle private quarrels amicably and contribute toward the maintenance of an atmosphere of calm among individuals by removing petty causes of irritation, which, by accumulating, often produce great hostilities. It is the same way among nations. It is by preventing minor disturbances in their relations that we prepare the ground for understandings when greater interests are at stake. The solemn recognition of the principle of arbitration has already created a disposition among the various nations to resort to it



for the settlement of disputes in a field the limits of which are being incessantly extended. Thus, since 1899, thirty-three arbitration conventions have been concluded among the various nations. Moreover, four great and complicated cases, capable of creating irritation among the Powers, have been taken before the Arbitration Court at The Hague, and the Commission of Inquiry created by the Act of 1899 had, as everybody remembers, to concern itself with an exceedingly serious case which, had it not been for its intervention, might have had the most dangerous consequences.

Later on he cautioned the Conference not to be too ambitious.

Let us not forget that our means of action are limited, that nations are living beings just like the individuals composing them; that they have the same passions, the same aspirations, the same failings and the same impulses. Let us not forget that, if in everyday life the judicial organs, in spite of the severity of the punishments which they are authorized to mete out, do not succeed in preventing quarrels and acts of violence among individuals, it will be the same among nations, although the progress of conciliation and the progressive softening of manners must certainly diminish these cases. Let us above all not forget, gentlemen, that there is a whole series of cases in which honor, dignity and vital interests are involved in the case of individuals as well as of nations, and in which neither one nor the other will ever recognize any other authority than that of their own judgment and their personal feelings regardless of consequences.

However, let us not allow this to discourage us from dreaming of a universal peace and fraternity among peoples . . . . Let us therefore go bravely to work, having the luminous star of peace and universal justice to light our way, and although we shall never reach it, it will nevertheless always guide us toward the welfare of humanity.<sup>1</sup>

It would be unfair to say that the address of M. de Nelidow fell flat. It is, however, a fact that it aroused no enthusiasm. His manner was correct and dignified, as becomes the diplomat, but in his appearance, in his voice, and in his occasional gestures, there was an apparent lack of sympathy with the pur-

<sup>1</sup> For the text of M. de Nelidow's address, see *La Deuxième Conférence Internationale de la paix, 1907, Actes et Documents, Vol. I, pp. 49-52.*

pose of the Conference and its surroundings, for which lack, no amount of diplomatic propriety could make up.

The opening addresses show strict compliance with the proprieties of the occasion. The Dutch Minister of Foreign Affairs proposed that its respectful homages be laid "at the feet" of His Russian Majesty, and M. de Nelidow likewise proposed that the grateful acknowledgment for a gracious reception be laid at the feet of Her Dutch Majesty. Their Majesties were duly edified by these evidences of homage and devotion, as was indicated by the telegrams which each "deigned" to send to the Conference. It is interesting to note, in this connection, that no telegram was sent to President Roosevelt, the real initiator of the Conference. This is, of course, a small matter, attributable either to a desire to keep the Conference within the family, so to speak, or to indifference of the proprieties where imperial and royal personages are not involved. Before the close of the Conference, it became abundantly clear that a blunder had been made in not telegraphing President Roosevelt, and at the last session, tardy reparation was made by the following telegram:

At the termination of its labors, the delegates to the Second Conference of Peace recall with gratitude the initial proposition made for its convocation by the President of the United States, and present to him their respectful homages.<sup>1</sup>

Had a telegram been sent at the beginning, instead of at the end of its labors, the Conference would have received a ringing

<sup>1</sup> To this telegram under date of October 24, 1907, Mr. Root replied as follows:

"I have the honor to advise Your Excellency that the President has received the telegram of the 18th instant by which you informed him that the delegates to the Second Peace Conference remembered with gratitude the initial proposition which was made by the President for the convocation of the Conference, and having completed their labors, wished to present to him their respectful homage.

"I am charged by the President to express to you and to the delegates to the Conference his high appreciation of your courteous message and his sense of the honor conveyed by it, and to offer to the delegates his congratulations upon the beneficent results of their deliberations."—*La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, p. 602.*

message from our President, which might have dispelled the gloom of the first days and counted for much in the work of the Conference itself.

In brief, but it is hoped, in sufficient detail, I have mentioned the successive steps by which the conference was called, the States invited, and the manner in which this was determined, the program of the Conference, with the rights reserved by various delegations to bring to discussion other subjects of international importance; the opening of the Conference itself, and the proceedings of a purely formal or perfunctory character. The Conference, however, required to be organized and subdivided, because it was an unwieldy body, fitted to approve but not to discuss in detail technicalities. Then, too, a code or rules of procedure should be adopted for the guidance of the Conference, and an efficient secretariat organized, without which, division into committees and rules of procedure would be of little value.

## 5. PROCEDURE OF CONFERENCE

In the matter of procedure, the president proposed to follow the method employed by the Conference of 1899, adapting it to new conditions. The assembly being, as he said, very numerous, it seemed useful—he might have added necessary—for the regulation of its labors, to frame a code of rules. He thereupon introduced a project, or *règlement*, consisting of twelve rules, which was adopted in its entirety, with the exception of the last paragraph of Article 8.<sup>1</sup> The clause in question provided that the delegation of a power may be represented by the delegation of another power, to which the British delegate, Sir Edward Fry, objected, for the very sound reason that the Conference is a deliberative assembly, and consequently a delegation which has not taken part in the deliberations should not vote. This view was shared by Baron Marschall von Bieberstein and M. Bourgeois, and the Conference rejected the objectionable clause.

<sup>1</sup> For the text of the *Règlement*, see Appendix, pp. 770-772.

Article 1 provided that the Conference be composed of plenipotentiaries and technical delegates, and Article 3 likewise speaks of these two classes. The distinction is one not merely of dignity, but of essence. The plenipotentiary is a political or diplomatic agent of his Government and binds it to the extent of the power entrusted to him. The technical delegate, on the other hand, is an expert appointed by his country to aid the plenipotentiary and, under his supervision, to take part in the proceedings. He aids and advises, but it is the plenipotentiary who assumes responsibility for the act and is alone authorized to sign proceedings. It is natural, therefore, that plenipotentiaries should register in any one of the commissions or all of them, according to their own convenience, but that technical delegates should only take part in the commissions for which they were designated by their plenipotentiaries. The secretaries of the various delegations and the minor officials generally did not form part of the Conference, strictly so-called. The plenipotentiaries and technical delegates were accredited to the Conference and were necessary to its successful operation. The secretaries of the delegation and the lesser officials were, in reality, accredited to the delegation, not to the Conference, and while they no doubt performed very valuable services, these services were rendered to the delegations as such, not to the Conference.

The second article of the *Règlement* provided for the subdivision of the Conference into commissions. The reason for this was evident, for the program proposed by the Russian Government and accepted by the powers represented at the Conference, was long, elaborate, and susceptible of separation into groups. The conference of 1899 had found it necessary to apportion the work among three commissions. But inasmuch as the program of 1907 was more elaborate, and as the representatives were much more numerous, it seemed necessary not merely to form three, but four commissions. The recommendation for the formation of four commissions and the distribution of the program among them were agreed to as follows:

## FIRST COMMISSION.

Arbitration.

International commissions of inquiry and questions connected therewith.

## SECOND COMMISSION.

Improvements in the system of the laws and customs of land warfare.

Opening of hostilities.

Declarations of 1899.

Rights and obligations of neutrals on land.

## THIRD COMMISSION.

Bombardment of ports, cities, and villages by a naval force.

Laying of torpedoes, etc.

The rules to which the vessels of belligerents in neutral ports should be subjected.

Additions to be made to the Convention of 1899 in order to adapt to maritime warfare the principles of the Geneva Convention of 1864, revised in 1906.

## FOURTH COMMISSION.

Transformation of merchant vessels into war vessels.

Private property at sea.

Delay allowed for the departure of enemy merchant vessels in enemy ports.

Contraband of war. Blockades.

Destruction of neutral prizes by *force majeure*.

Provisions regarding land warfare which should also be applicable to naval warfare.

Articles 3 and 4 relate to the official organization of commissions and sub-commissions. A careful reading of these articles shows at once the relation of the commission to the Conference, on the one hand, and the sub-commission to the commission, on the other. The commission is the offspring of the Conference, and the Conference retained in its own hands the right to appoint the president and the vice-



president of each commission. This may seem natural, but it was clearly the result of design; for the control of the commission meant practically the control, not merely of the proceedings before the commission, but of the positive results of the Conference. While it is stated that the Conference shall officer the commissions, it must not be supposed that anybody was proposed from the floor of the Conference. The president submitted the list of officers and the Conference assented, and perhaps M. de Nelidow would have been astonished had he been told that his various appointees were not freely elected by, and therefore not the choice of the Conference.

Leaving out the honorary presidents and the vice presidents, the effective presidents, that is, chairmen, of the various commissions were: First Commission, M. Léon Bourgeois, of France; Second Commission, M. Beernaert, of Belgium; assistant president, M. T. M. C. Asser, of Holland; Third Commission, Count Tornielli, of Italy; and Fourth Commission, M. de Martens, of Russia. From this list, it is seen at once that the chairmen selected were fully abreast of their duties, because, with the exception of Count Tornielli, they had all acted as chairmen in the Conference of 1899; but however competent these presidents were, and no criticism whatever is made of their ability, impartiality, and deep interest in the work of the commissions entrusted to their care, the fact remains that they were selected by Russia—not by the Conference at large, and it is a further fact that, although the United States was the real initiator of the Conference, no American delegate was entrusted with the presidency of a commission, although Messrs. Choate and Porter were honorary presidents of the Third and Second Commissions, respectively.

The reason for M. Asser's selection as deputy president was that the precarious condition of M. Beernaert's health made it uncertain whether or not he would be able to preside in person during the Conference.

Continuing the examination of Article 3, it is to be noted that each commission was to appoint its secretary and reporter:

but as the president of the commission either directly suggested or indirectly proposed these functionaries, it is at once apparent that the various commissions were officered directly or indirectly by the Conference—that is to say, its president, and that the control and supervision of the entire Conference was centered in the first delegate of Russia.

Passing now to Article 4, it is seen that the sub-division of the commission was left to the commission in question, and that its officers, technically called its "bureau," were to be determined by it. As a matter of fact, each commission, with the exception of the fourth, was divided into sub-commissions, known respectively as the first and second sub-commission. M. Bourgeois wisely and fortunately took upon himself the presidency of the First Commission and of each sub-commission, and presided in person over two of the three committees of examination (A and B) of the First Sub-Commission—as well as the committee of examination of the Second Sub-Commission, charged with the consideration of the project for an international prize court. It is difficult to mention the name of M. Bourgeois without pausing to pay a tribute to his untiring devotion to the aims and purposes of the Conference. His infinite tact, his unfailing courtesy, his wide experience as a presiding officer of parliamentary as well as of diplomatic bodies, his profound knowledge of public affairs and the relative importance of general principles and of intricate detail, his willingness to sacrifice the non-essential to fundamentals, and the spirit of conciliation and compromise which illumined his person and mellowed his speech, made him not only a power but a controlling influence for good in all that concerned the Conference, and the commissions of which he was president.

The secretary of each commission, sub-commission, or committee, performed the duties ordinarily incumbent upon such officer. The reporters, however, are unfamiliar to the American public, although elsewhere well known and appreciated. The function of a reporter was admirably defined and illustrated in the First Conference by M. Descamps, who said:

The reporter of a diplomatic conference should present to the full assembly the general character of the discussions, and the exact nature of the solutions proposed, unclouded by the expression of his personal opinion.<sup>1</sup>

And his own report of the proceedings of the Third Commission, regarding the pacific settlement of international disputes, is a masterpiece.<sup>2</sup>

<sup>1</sup> Conférence Internationale de la Paix, 1899, part III, Second Commission, p. 1. At the first session of the Third Commission its accomplished president, M. Bourgeois, remarked: "The Reporter should be neither the advocate of a thesis nor the representative of a majority, but the faithful interpreter of the opinions expressed by all members." *Ib.*, part IV, Third Commission, p. 1.

<sup>2</sup> Of M. Descamps' remarkable exposition of the labors of the committee of examination of the Third Commission (Conférence Internationale de la Paix, 1899, part IV, Third Commission, pp. 10-14) M. Bourgeois said:

"That the applause which has greeted the words of M. Chevalier Descamps bear witness to the sentiments felt by the assembly upon hearing the exposition, so clear and highly inspiring, which has just been presented to it.

"This exposition will remain the most lucid and useful commentary of the provisions which will be reached concerning arbitration, and it will be the surest guide, not only for the members of the Conference, in the course of their discussions, but also in the future for the governments themselves, when it is a question of interpreting the text of the convention.

"Under these conditions, M. le Chevalier Descamps has a right to the gratitude of all, and the President takes it upon himself to convey it with a keen and sincere emotion."

To which M. Beldiman of Roumania replied at the opening of the next session, that he "fully concurred in the words of praise which the President addressed to Chevalier Descamps upon the occasion of the very clear exposition he presented in the preceding session.

"However, so far as the official interpretative character which has been attributed to this work, without contesting its perfect faithfulness, perfect freedom of action must be left to my Government upon this point."

At the ninth session M. Bourgeois said of M. Descamps and his report:

"I congratulate myself, gentlemen, upon the response which you have just made to my question. I see in it a striking manifestation of the approval which you have given to the very remarkable work of our reporter,

"In preparing this memorable document, M. Descamps rendered two great services to the cause which has brought us together here. In the first place, he has, by a continuous and perfectly clear commentary, made easily comprehensible, and interpreted well all the clauses which you have adopted with a view to the pacific adjustment of international disputes. I

A leading delegate of the Second Conference, M. Renault, and its most accomplished reporter, says that:

the reports presented to the Conference from the various commissions constitute the exposition of the reasons involved in and leading to the negotiation of the conventions." <sup>1</sup>

The procedure was practically the same for all commissions. The propositions presented by various delegations or delegates were considered, and when substantial agreement had been reached, or it seemed advisable to refer the settlement of details to a small body, a commission of examination was formed, generally composed of representatives from the delegations presenting propositions. In this way, the First Commission and its First Sub-Commission considered matters dealing with arbitration; the Second Sub-Commission devoted itself exclusively to the prize court. A committee of examination was appointed for the First Commission, to consider the amendments to be made to the convention for the peaceful adjustment of international differences, and this committee of examination dealt with the various propositions concerning the subjects of good offices, mediation, and the commission of

have already said that the first exposition which he made to you of these provisions would be a sure guide not only for the delegates in their discussions, but also for the governments. I can say today that with your support, the report of M. Descamps will be a useful guide to all civilized nations.

"But your reporter has rendered you still another service. Not only has he translated exactly the intention of those who drew up each article, he has further clarified all portions of your work by his great ability and his profound knowledge of international law.

"M. Descamps is one of those in the world who have devoted themselves to the cause of arbitration in the best and most useful way. He has put into his duties as reporter, besides the fruit of his experience, all his personality, and I am happy to address to him here again the expression of our deep gratitude." (Conférence Internationale de la Paix, 1899, part IV, Third Commission, pp. 70-71).

<sup>1</sup> See Professor Renault's excellent article on the Work of The Hague, p. 586, in *La Vie Politique des Deux Mondes*, edited by M. Achille Vialatte (1908).



inquiry. Later, when the subjects of arbitration and the proposition for the establishment of a permanent court of arbitral justice were before the commission, M. Bourgeois suggested that the original committee should be enlarged by the addition of certain members, and the committee as thus enlarged was called Committee of Examination A. At the same time, other additional members were added to the original committee, primarily for the consideration of the court of arbitral justice, and when thus sitting, was known as Committee of Examination B. Finally, the details of the revision of the convention for the adjustment of international conflicts in the matter of procedure, were referred to a committee known as Committee of Examination C selected by the president from the members of Committee of Examination A. It thus appears that the First Sub-Commission of the First Commission had no less than three committees of examination.

Turning now to Article 5 of the *Règlement*, it is observed that a committee (*Comité de Rédaction*) was formed for the purpose of coördinating the acts adopted by the Conference and preparing them in their final form. This committee was appointed early in the session, but as it was so large as to be unwieldy, a sub-committee consisting of eight members of the Conference, under the presidency of M. Renault, was appointed. This committee performed services of the greatest value. It prepared preambles for all of the conventions; it revised the language without changing the meaning of the various conventions; and it inserted in their proper places the various propositions which had been voted but not assigned any particular place in a convention. In a few instances the sub-committee suggested changes of substance as well as of form, but these changes were reported to the full Committee of *Rédaction*, and by it reported to the Conference, so that the few changes of substance, as well as the many changes of form, were voted upon by the Conference, and derived their validity from the approval of the Conference as a whole.

Passing now to other portions of the *Règlement*, it is seen that by Article 6 the members of the delegations were author-



ized to take part in the deliberations of the plenary sessions of the Conference, as well as in the commissions of which they formed a part, and that the members of one and the same delegation might mutually replace one another, and by Article 7, members of the Conference attending meetings of the commissions of which they were not members were not entitled to take part in the deliberations without special authorization by the presidents of the commissions.

It has been stated that the Conference was a diplomatic assembly and that each delegation had a right to one vote, and it is a matter of interest to mention that the vote was taken by roll-call of the States, according to the alphabetical order of their names in French.

It is also perhaps a matter of interest to state that a delegation voted affirmatively by replying "Yes," and negatively by "No," and that it frequently declined to vote by stating that it "abstained," or that it voted subject to reservation.

A great deal of criticism was aroused in the First Conference by the fact that contrary to parliamentary procedure, the vote was taken not upon the amendment, but upon the original proposition, but this departure from parliamentary procedure was corrected in the Second Conference, and the amendment was first put to vote, as is the rule in deliberative bodies.

Immediately upon the acceptance of the program and its assignment to the commissions, Baron Marschall von Bieberstein arose and stated that his Government had instructed him to propose to the Conference the establishment of an international court of appeal in prize cases, leaving to national tribunals the right to pass upon the validity of prize cases in the first instance; that this proposition was closely related to the work of the First Conference, and inasmuch as it looked to the peaceful settlement of conflicts, it was within the sphere of the First Commission. Sir Edward Fry stated that the British delegation had received like instructions, and that it would be a pleasure to collaborate with other delegations in thus extending the principle of arbitration. It thus appears

that the Russian program was enlarged in a very important point by the addition of a project which was not the subject of previous diplomatic negotiation and agreement. Closely related to arbitration and the judicial settlement of international disputes, it was clearly within the scope of the conference, and if not within the letter, clearly within its spirit.

It will be recalled that the United States reserved the right to propose the limitation of force in the collection of contract debts. Mr. Choate therefore reserved at the same session the right to present such a project to the Conference, and at the same time the right to submit all other projects within the competence of the Conference but not mentioned in its program. The president stated that the submission of projects was covered by the ninth rule of the *Règlement*; that propositions are of two kinds: first, those which directly concern the subjects enumerated in the program, and others which are related to or connected with the provisions of the program. These latter should be, in accordance with Article 9 of the *Règlement*, reduced to writing and communicated to the president, in order to be printed and distributed before being brought to discussion. He further said that the British delegation had acted in strict conformity with the rule by addressing a letter to him, in which the British delegation stated that it considers that the adoption of the program does not exclude the possibility of discussing other subjects which may be presented during the meeting of the Conference, and reserving the right so to do. The explanation of the president was satisfactory to the Conference.

The incident, slight as it may seem, was not unimportant, because on the first business day various delegations claimed the right not only to present propositions springing directly from the program, but the further right to present various projects within the scope of a peace conference, although such subjects might not or did not figure in the official program. On several occasions during the Conference exception was taken that the matter for discussion did not fall within the program, and therefore was not properly the subject for discussion.

A generous view was, however, taken in each instance and it does not seem that any serious—certainly no insurmountable—objection was made to the discussion of any subject which, by fair interpretation, came within the scope of the Conference.

Article 10 provided that the public might be admitted to the plenary sessions of the Conference upon presentation of tickets distributed by the Secretary General with the authority of the President. A final clause of the article stated that the bureau might decide at any time that certain sessions shall not be public.

This article did not mean that the Conference was open to the public, but that the public might be admitted, as it always was, to the purely formal reunions of the Conference in plenary session where the results already reached in commission were approved, or, as happened in the case of the proposed convention concerning neutral persons, referred back to the commission for further action.

The public was excluded from the commissions where the real work was done, but the notices given to the press by the Secretary's office and through Mr. Stead's *Courrier de la Conférence de la Paix* were sufficiently full and accurate.

The minutes of the Conference, technically known as *procès-verbaux*, were in French, and, while the various speeches and addresses were not reported verbatim, the abstracts were usually sufficiently extended and accurate. The minutes were printed after each session, distributed to the members for their information and for correction of mistakes, and as each delegate, under Article 11, had the right to insert in full the text of his address, it is improbable that any matter of importance was omitted from the minutes.

The Conference in its plenary session had its official *procès-verbal*, each commission and sub-commission had its *procès-verbal*, and the committees of examination of the First, Fourth and Third Commission (Second Sub-Commission) had likewise *procès-verbaux*.

As the reports of the various reporters were in French, and

formed a part of the records of the sub-commission and various commissions, it will be seen that the record of the Conference as a whole was kept both with fullness and accuracy.<sup>1</sup>

As stated in Article 12 of the *Règlement*, French was the official language of the Conference, but any member was permitted to speak in any other language. In such cases, the addresses were summarized orally in French, so that all members of the Conference might understand what had been said. As a matter of fact, only four languages were employed, most delegates using French. Mr. Choate always addressed the Conference in English, and his addresses were ordinarily summarized in French by Baron d'Estournelles de Constant, or by M. Fromageot. The first delegate of Japan sometimes spoke in French, and sometimes in English; but toward the end of the Conference, he usually spoke in French. The second delegate from Bulgaria once addressed the First Commission in English, and on a few occasions a Turkish delegate spoke in English. Mr. Rose delivered one address in English, and Mr. John W. Foster delivered his address on the Immunity of Private Property in English. Dr. Lammasch, when addressing an appeal directly to the American delegation, took the liberty of paraphrasing in English what he had previously said in French, and M. Kriege, when the subject was intricate or of great importance, ordinarily addressed the convention in German, which was immediately translated into French by

<sup>1</sup> The proceedings of the Conference will be published by the Dutch Government in due course as appears from the following official announcement:

Le Recueil des Actes de la Seconde Conférence de la Paix est divisé en trois volumes, dont le premier contient le programme, la liste des délégués, les procès-verbaux des séances plénières, les rapports présentés à la Conférence et les Conventions,— le second les protocoles des séances, de la Première Commission, de ses Sous-Commissions et de ses Comités ainsi que les Annexes où se trouvent consignés les projets, propositions et autres communications des délégations concernant les matières dont la usage, Commission éta it saisie, enfin des tableaux synoptiques dressés à son au cours des délibérations,— le troisième toutes les pièces analogues se rapportant aux travaux des trois autres Commissions. A la fin de ce troisième volume se trouve une table alphabétique des matières.



M. Asser or M. Karnebeek. It is thus seen that French was the official language, and that other languages were rarely resorted to by the delegates.

Immediately after the president's address at the first session of the Conference, on June 15, the president proposed for secretary-general, M. W. Doude van Troostwizk, Minister Resident of Her Majesty the Queen of the Netherlands, and as editor of the Procès-Verbal (*Secrétaire Général de Rédaction*), M. Prozor, Technical Delegate of Russia. The personnel of the secretary's office was composed of minor officials of the various delegations, chosen in such a way as to represent not merely the countries, but the languages at the Conference. The secretary-general detailed various members of his staff to the Conference in plenary session, to the different commissions, sub-commissions, and committees of examination, so that the labor of reporting speeches and forming the procès-verbal might be done with accuracy and dispatch. The procès-verbaux were prepared with remarkable rapidity, were uniformly delivered before the meeting of the next session, and, considering the magnitude of the task and the intricacy of detail, were not only marvels of accuracy, but worthy to serve as models. M. Doude van Troostwizk, M. Prozor and their associates merited the praises repeatedly lavished upon them.

## 6. THE WORK OF THE FIRST COMMISSION

Having thus considered, perhaps in too great detail, the calling of the Conference, its opening and organization, we are now prepared to consider the positive results of the Conference, as attested by the Final Act.

There are two ways in which we may set forth the work of the Conference: first, by considering each commission and the results of its labors; or, second, by disregarding the division into commissions, we may consider the Conference as a whole, and its work as evidenced by the Final Act. Each method has its advantages. As, however, each convention, declaration, resolution, and recommendation will be considered



later in detail, approximately in the order of the Final Act, it is perhaps advisable to give in this place a general survey of the work of the commissions and the means by which it was produced. This method will have the great advantage of treating together the really great and important work of the Conference, namely, the subject of arbitration. First, then, of the First Commission.

It will be remembered that the greatest single piece of constructive work of the First Conference was the convention for the peaceful adjustment of international differences. This measure would alone have justified the calling of the Conference, and its successful application within the past few years has justified its framers in the hope that it would be of great service in maintaining the world's peace. The mere fact that a litigant can point to The Hague Court and request its adversary to resort to it, is a great gain for the rational solution of difficulties susceptible of judicial settlement.

The convention consists of four principal divisions: first, the sections relating to good offices and mediation, Articles 2 to 8; second, the provisions relating to and establishing a court of international inquiry, 9 to 14; third, the sections relating to the nature of arbitration, and its applicability to international disputes, 15 to 29; and, fourth, the sections relating to arbitral procedure, 30 to 57. The sections dealing with good offices and mediation were happily applied by President Roosevelt and led to the termination of the Russo-Japanese War. The court of international inquiry, limited strictly to the ascertainment of facts in a controversy, has been called into being once, and its settlement of the controversy arising out of the Dogger Bank incident adjusted an acute international incident which might otherwise have resulted in war.

The sections dealing with arbitration, recognizing and recommending as they did the peaceful and reasonable solution of differences which diplomacy failed to settle, gave international sanction to this substitute for war, and have resulted in the negotiation of more than fifty treaties by which nations

pledged themselves to arbitrate their differences.<sup>1</sup> The establishment of a court to which these differences may be referred, and by which they may be adjudicated, according to a code of procedure reasonable and comprehensive, leads to the hope that, in no distant future, justice may be administered impartially and judicially, between nation and nation, as it is now administered between man and man in national courts of justice. How the First Commission revised this great convention and made it more adequately meet international needs will be described later. But the commission did not content itself with revising the convention; it sought by four measures to advance the cause of international justice and peace and thus to justify its existence.

In the first place, the commission endeavored to register an advance in the matter of arbitration by pledging the nations internationally to arbitrate their differences. An agreement to arbitrate is of two kinds: special and general, and a nation may well agree to arbitrate certain kinds of differences already existing, whereas it may be unwilling to pledge itself in advance to arbitrate all future differences, or indeed differences of a particular category. An agreement to arbitrate an existing, concrete difference, is a gain; a present agreement to arbitrate future differences, be the category large or small, would be a triumph for the cause of international justice and peace. If the nations bound themselves to arbitrate these difficulties as they arise, the treaty would technically be called a treaty of compulsory arbitration, for compulsory arbitration merely means a self-imposed present agreement to arbitrate future differences. It is voluntary in the sense that no nation is coerced to it; it is obligatory in that it binds the nation which has agreed to it.

In his opening address to the First Commission, M. Bourgeois stated that nations might well do jointly that which they had done separately, or in groups, and that a general treaty of arbitration might well result from the labors of the commis-

<sup>1</sup> See Appendix, pp. 807-814

sion. An examination of arbitration agreements shows that nations are averse to pledging themselves in advance to arbitrate questions concerning their independence, vital interests, or honor, and as each nation reserves to itself the right to decide when independence, vital interests and honor are concerned, it may seem that the agreement to arbitrate may be of little practical value. It should not be forgotten, however, that a refusal to arbitrate exposes a nation to international criticism, and that the condemnation of enlightened public opinion is in itself no mean penalty. There can be no doubt, that the adoption of such a general agreement would have been an advance, for if it were not an advance it would not be opposed by nations averse to arbitration. Baron Marschall von Bieberstein stated that Germany was in favor of compulsory arbitration, but that his country was opposed to a project containing the reserves above mentioned, but added that he would examine without bias (*sans parti pris*) the project for unlimited and unrestricted arbitration of certain specified lists. It seemed, therefore, that the cause of arbitration was destined to a certain and speedy triumph; for the friends of progress had already proposed a treaty of arbitration containing a list of subjects which did not seem likely to involve independence, vital interests, and honor, and which could therefore safely be arbitrated without restriction. The address of Baron Marschall von Bieberstein aroused the greatest enthusiasm; for, as the opposition of Germany in the First Conference threatened to defeat arbitration, the coöperation of Germany seemed to forecast its triumph in the Second Conference. The exultation, however, was of short duration, for it soon became painfully evident that Germany, while accepting the principle of obligatory arbitration, and favoring special treaties with certain carefully selected nations, was opposed to a general treaty of arbitration with all nations, whether that treaty was limited to the arbitration of legal questions and the interpretation of treaties, with the time-honored reserves, or whether it consisted of unrestricted arbitration of a carefully selected list of subjects. An exami-

nation *sans parti pris* resulted in the rejection of every proposed subject of arbitration, be it large or trivial. The rejoicing which followed Baron Marschall von Bieberstein's declaration in favor of compulsory arbitration and his promise to examine lists *sans parti pris* gave way to gloom and depression after Dr. Kriege's speech in the committee of examination, from which it appeared that Germany had made up its mind to oppose arbitration in any form. Dr. Drago, sitting next to me, wrote on a slip of paper, "This is the death of arbitration," and it was. Weeks of discussion failed to overcome the opposition of Germany and its slender following. It can not be said, however, that the discussion was of no avail. It showed the immense progress arbitration had made since the First Conference; for, while opposing arbitration in the concrete, no power questioned the principle of obligatory arbitration, which, as will be seen in a subsequent lecture, was unanimously approved by the Conference. Germany's triumph, was at best, a Phryic victory.

In expressing personal regret at the attitude of Germany, I do not indulge in criticism, because Germany had as much right to its opinion, formed after mature consideration, as the other States had to theirs, formed, it is to be hoped, after equally careful consideration. Germany has not been an exponent of arbitration: its triumphs, leaving aside literature, science, and philosophy, have been upon the battlefield. It realized the hopes of centuries in a united German nation, not in the study, but in the field, and, surrounded as it is by powerful and aggressive neighbors, it is determined to hold by the sword that which the sword has won. It is seemingly unwilling to entrust its interests to the world at large, and it claims and exercises the right to form its judgment untrammelled by treaty or public opinion. The "era of blood and iron" is not yet past.

But if Germany was unwilling to enter into a general treaty of arbitration with all nations for the arbitration of all subjects, Germany showed that it was willing to enter into a special treaty relating to a single category of questions. I refer to



the second great measure, namely, the proposition for the restriction of force in the collection of contract debts, introduced by the American delegation and loyally supported by Germany. Indeed, I am betraying no confidence when I state that Germany came to the Conference with a carefully prepared and wholly acceptable project on the subject, which so closely resembled the American project presented to and voted by the Conference, that it could have been accepted as a substitute. This was the clearest case of an agreement for arbitration of a concrete specific case, and its significance is world-wide; for, as will be seen, the nations, assembled in solemn conference, agreed to renounce the use of force in the collection of contract debts, provided only that the debtor nation agrees to arbitrate, that it actually does arbitrate, and that it executes the arbitral award when reached. It will be recalled that the United States reserved the right to bring this subject to discussion, thereby testifying to its importance, and, if it be borne in mind that the agreement is in reality a case of obligatory arbitration, it can not be said that the Conference contented itself with a general statement of the principle, and failed to embody it in concrete form, or that Germany refused to accept a concrete embodiment of the principle because it opposed and caused the defeat of a general treaty of obligatory arbitration.

In the next place, an attempt was made to establish at The Hague a court of justice for the settlement of international disputes, to be composed of judges trained in the administration of law and open at all times to receive and adjudge, under a sense of judicial responsibility, controversies presented to it. A project for the establishment of such a court was presented by the American delegation. It was supported by Great Britain and Germany, and through the efforts of these three delegations and the devotion of M. Bourgeois, a project of thirty-five articles was finally adopted by the Conference, and the establishment of the court based upon the project was recommended. The idea of a permanent court thus triumphed. It matters but little that the composition of the court was not



agreed upon. The world is ruled by ideas, and either between the meeting of the conferences, or at the Third Conference, a court, permanent in its nature, will surely be established, so that disputes, whether arising out of a universal convention or out of conventions among several of the States, may be authoritatively and judicially decided by a permanent court of nations. It is indeed, as was humorously said, a court without judges—but the judges will enter in the fullness of time.

In the fourth place, the First Commission attempted and succeeded in establishing an international court of prize. The initiative in this very important matter was taken by Germany and Great Britain at the first meeting of the commission, and the projects presented by Germany and Great Britain not only served as a basis for discussion, but were the foundations upon which the court was erected. There were, however, great and seemingly irreconcilable differences between the German and the British propositions. Germany sought to provide for a court to be constituted upon outbreak of war, whereas Great Britain looked to the establishment of a permanent court. Germany proposed a court of five members, two of whom should be high naval officers of the belligerent countries, the balance of the court to be selected from the panel of judges of the permanent court. Great Britain proposed a court composed of judges selected from the nations having a merchant marine of 800,000 tonnage. Germany proposed an appeal to be taken directly from the court of first instance, Great Britain an appeal only from the court of last resort. The timely and courteous intervention of Mr. Choate reconciled the differences by proposing that the court should be permanent, that the great maritime powers should be permanently represented in the court, that the other powers should have a proportional representation, that an appeal should be taken from the court of first instance or from a decision of a national court of appeal, according to the preferences of local legislation, and that naval officers might act in an advisory capacity as assessors in the deliberations but that they should not have a vote in the decision. Mr. Choate also manifested

his interest in the court by appearing as a joint sponsor, as did France, so that the project was introduced as the joint proposal of Germany, Great Britain, France, and the United States, and by its adoption with but one negative vote, it is indeed a project for an international court of prize. As with the proposed court of arbitral justice, so with the international court of prize, the wits have had their jest. The one was a court without judges; the other is a court without law, because the nations failed to codify international law, and thus supply the court with a code of maritime law to be administered and interpreted by it. But the nations can as easily supply the law for the prize court as they will the judges for the Court of Arbitration, and at the present time Great Britain has called a conference of leading maritime nations, to be held in London in the course of 1908, in order to codify maritime law and custom, which it is hoped the court, when adopted by the nations, will administer, should controversies be presented for its adjudication.

The First Commission therefore has four claims to consideration and respect, namely, first, a careful, painstaking, and adequate revision of the convention for the peaceful settlement of international disputes; second, a declaration in favor of obligatory arbitration, and a convention for the arbitration of contract claims; third, a project for the establishment of a court of arbitral justice; and, fourth, a convention for the establishment of a court of prize. To have been able to perfect or add in some small measure to the convention for the peaceful settlement of international disputes was no small triumph in itself; to have secured the unanimous recognition of the principle of obligatory arbitration, and to have laid the foundations broad and deep of two great courts of international justice, are events of international importance and mark an era in the world of progress.

## 7. THE WORK OF THE SECOND COMMISSION

To the Second Commission were assigned the matters pertaining to land warfare, for example,

improvements in the system of the laws and customs of land warfare, opening of hostilities, declarations of 1899 relating thereto, and rights and obligations of neutrals on land.

The commission divided itself into two sub-commissions, the first of which under M. Beernaert dealt with the subjects of the revision of the convention concerning the laws and customs of land warfare and the declarations of 1899. The Second Sub-Commission, under the presidency of M. Asser, considered the opening of hostilities and the project of a convention to regulate the rights and duties of neutral States and persons in land warfare. As these subjects are highly technical in their nature and do not lend themselves to general treatment, they are reserved for subsequent consideration; but it should be said that the convention of 1899 concerning land warfare was revised in much the same way as the First Commission revised the convention for the peaceful settlement of international disputes; that the declaration of 1899 prohibiting the throwing of projectiles from balloons was renewed and instead of being limited to a period of five years is continued in effect until the close of the Third Conference.

The Second Sub-Commission reported and framed a convention concerning the opening of hostilities, by which the powers bound themselves not to engage in warfare without a declaration of intention, and freeing neutrals from the observance of neutral obligations, unless and until they received notice directly or indirectly of the existence of war or hostilities; and, finally, a convention—a mere fragment, it must be admitted—regulating the rights and duties of neutral States and persons in land warfare.

The Conference has been much criticised for devoting so large a part of its time to war, but as war is likely to occur in the future, as it has in the past, it is certainly a wise task and not unbecoming an international conference, to humanize, as far as possible, the rules and customs of war, while creating, at one and the same time, an acceptable substitute for force. The answer to the objection has already been made; for exam-

ple, M. Beernaert, in opening the First Commission, quoted his friend M. Arthur Desjardins as saying

Even yesterday a military chieftain might say "What is the law of nations? A mass of rules, locked up in the head of jurists. I do not recognize their force." Today, we may reply, these rules have been sanctioned by your own Government, which is henceforth bound by its signature. They must be obeyed.

To have corrected, even in a measure, the hardships incident to war; to have eliminated doubt and introduced certainty; to have imposed a restraint upon the rights of the conqueror, and to have protected the vanquished in life and property—are results of which we may well be proud.

## 8. WORK OF THE THIRD COMMISSION

The Third Commission dealt with the problems of naval warfare and by a series of carefully considered conventions added materially to the progress of international law. Count Tornielli, first delegate of Italy, was the president of the commission, and upon his motion it was divided into two sections, the first under the presidency of M. Hagerup, dealing with the bombardment of ports, cities, and villages by a naval force, and the laying of torpedoes; and the second, under the presidency of Count Tornielli himself, dealing with the rules to which the vessels of belligerents in neutral ports should be subjected, and the additions to be made to the conventions of 1899 in order to adapt to maritime warfare the principles of the Geneva Convention of 1864 as revised at Geneva in 1906. As in the case of the conventions concerning land warfare, the various conventions of the Third Commission concerning naval warfare are technical and it is sufficient to say in passing, leaving the details for subsequent consideration, that satisfactory conclusions were reached in each subject figuring in the program of the Third Commission, by which bombardment of undefended ports, cities, and villages was forbidden; that submarine mines should be laid in such a way as to be harmless when broken from their moorings; that satisfactory, if not



model rules and regulations were devised concerning the sojourn and conduct of belligerent vessels in neutral ports, and an admirable convention, humanitarian in origin and in all its details, was approved, extending to maritime warfare the beneficent principles of the various Geneva conventions. It was with great difficulty that conventions were concluded concerning the laying of mines and torpedoes, and the sojourn of belligerent vessels in neutral ports, and the fortunate result must be ascribed in large measure to the personal interest and persistence of Count Tornielli both in and out of the commission. It is evident from this statement that the conventions cover but a small part of a large field, and that many of the provisions are compromises of clashing and seemingly irreconcilable views; but a step in advance is still an advance, and we must not reject the minimum solely because it is not the maximum of our desires.

#### 9. THE FOURTH COMMISSION

The Fourth Commission makes but a sorry comparison with the Second and Third. Its positive results in conventional form were far from satisfactory, and its failures were even more marked than its partial successes. The comparative failure of the commission must not, however, be attributed to a lack of desire or energy on the part of its honored president, M. de Martens; for he brought to the Conference an authority second to none in the entire domain of international law, and years of experience as a trusted adviser of his Government had given him practical experience with the problems assigned to his commission. In the Conference of 1899 he had a large share in framing the convention for the pacific settlement of international differences, and as president of the Second Commission charged with the laws and customs of land warfare, he labored with M. Beernaert and M. Bourgeois to bring about the convention concerning the laws and customs of land warfare, which M. Desjardins rightly considered a veritable monument to progress and humanity. The unsatisfactory result of



the labors of the commission must, therefore, be ascribed to the fact that the subjects were difficult in themselves and the conflicting and divergent views were beyond the scope of compromise. Some of the questions have perplexed successive generations without finding a satisfactory solution; for example, the immunity of unoffending enemy property upon the high seas, a favorite dogma, though never the practice of the United States; and the little convention actually adopted exempting mail, inshore fishermen, and small coastal vessels from capture, is but an infinitesimal recognition of a great principle. The elimination of the place of transformation of merchant vessels into war vessels deprives the convention respecting transformation of merchant vessels of any great value, and the convention relating to the status of enemy merchant ships at the outbreak of hostilities is a distinct retreat by reducing that to a privilege which has hitherto had the sanction of enlightened practice and custom.

The failure of the commission to reach acceptable conclusions on the subjects of contraband, blockade, and the destruction of neutral prizes is unfortunate, although it was foreseen in advance that agreement would be difficult because of the radical differences of writers of authority and the practice of States. The failure is none the less unfortunate and discouraging. The same is true of the provisions regarding land warfare applicable to naval warfare. Taken as a whole, these subjects show the difficulty of reaching international agreement when material interests of the States intervene. It is well-nigh impossible to secure international recognition of national interests, and instead of endeavoring at an international conference to obtain recognition of national interest and practice, a State should rather determine in advance what it may sacrifice in the interest of all, rather than to struggle to obtain by discussion and compromise a national advantage at the expense of international well-being. As was pointed out by Lord Mansfield, it is much better that a rule be certain, and that it be known, rather than that it be intrinsically right, and it is more in the interest of the neutral as well

as of the belligerent that its rights and duties be ascertained and certain in advance of hostilities, rather than that any particular precedent, be it continental or Anglo-American, be adopted.

The labors of the Fourth Commission, however, were not in vain, for they will be of advantage to a third conference, and indeed the failure of the Second Conference to reach positive conclusions makes the convocation of a future conference well-nigh a necessity. The recommendation of the commission and of the Second Conference that "the preparation of regulations relative to the laws and customs of naval war should figure in the program of the next conference" is not an empty hope or desire, because experience shows that the *vœux* of one conference are the conventions of its successor.

Such is, in brief, an outline of the positive results of the labor of the various commissions. There are, however, two matters mentioned in the Final Act which were not discussed in commission, but which, however, are of great importance. The first is the action of the Conference reaffirming the resolution adopted by the Conference of 1899 in regard to the limitation of military expenditure; and the second is the recommendation that a third conference be held "within a period corresponding to that which has elapsed since the preceding conference," and that the program, organization, and procedure for the future conference be determined in advance of its meeting. As these matters will be fully considered later, it is only necessary in this place to indicate their importance without discussing their details.

## 9. THE NATURE OF CONVENTIONS, DECLARATIONS, RESOLUTIONS, RECOMMENDATIONS OR VŒUX

The positive results of the Second Conference appear in the Final Act in the form of thirteen conventions, a signed and unsigned declaration, a resolution and five *vœux*, of which the first and last—the establishment of the court of arbitral justice and the meeting of a third conference—are recommen-

dations adopted after profound discussion and deliberation. The conventions and signed declaration on balloons are contracts entered into by independent nations by which they mutually pledge themselves to do or not to do certain specified things. The unsigned declaration on arbitration proclaims the principle of compulsory arbitration and in so far establishes it. The resolution on the limitation of armaments is less formal than a declaration, but is nevertheless a finding or expression of the opinion of the Conference in concrete form on the point in question. These three forms are, however, regarded as complete and binding in themselves, in that they express a definite conclusion irrespective of future action by the powers upon their ratification.

The last class, technically termed "*voeux*," do not create a legal obligation as is the case with the convention and signed declaration; nor do they declare the existence of a principle as the declaration, nor the acceptance of a principle as is the case with a resolution. The *voeu* expresses a hope, a desire, a wish on the part of the Conference that something be done in the future which the Conference was unable to do. From this standpoint the *voeu* is, in simplest terms, a confession of failure to agree upon a convention, a declaration or a resolution; but the subject-matter of the *voeu* is considered so important that the Conference expresses the opinion that it is advisable and expedient, and its hope and desire that it be done.

The dividing line between a declaration and resolution on the one hand and the *voeu* on the other is thus very slight, and the *voeu* may in reality be a declaration or resolution even although it be included in the less formal and supposedly inferior category. This is especially the case with the *voeux* complete in themselves and which recommend that the powers by diplomatic action give full effect to the opinion expressed by the Conference. For example, the *voeu* dealing with the court of arbitral justice recommends that the powers establish the court upon the basis of the project of a convention adopted by the Conference as the result of prolonged discussion. Indeed, the project was voted as a Declaration, but owing to

the opposition of Belgium, Roumania and Switzerland that it take this form in the Final Act, and the feeling freely expressed in the Conference that a declaration could not be included in the Final Act against the expressed opposition of a single power, it was finally agreed that it figure in the Final Act as a *voeu*. The three powers agreed to withdraw their opposition on this condition, and, while they remained opposed to the project, they abstained from voting against the *voeu* and its insertion as such in the Final Act of the Conference. The difference would seem to be one of form, for whether as declaration, resolution or simple *voeu* it goes forth to the world, not only with the approval of the Conference but with its recommendation that the court be established as soon as the powers agree upon the appointment of judges and the composition of the court.

In the next place the *voeu* concerning the meeting of a third conference is in reality a resolution, for it recommends that a future conference "be held within a period corresponding to that which has elapsed since the preceding Conference." This is an expression of opinion based upon a resolution of the Conference that such a Conference should meet.

The second, third and fourth *vœux* express the opinion that the powers should in case of war safeguard the maintenance of pacific relations, more especially of the commercial and industrial relations between the inhabitants of the belligerent States and neutral countries (No. 2); that the powers regulate by special treaties the position "as regards military charges of foreigners residing within their territories" (No. 3); that the codification of the laws and customs of naval war should figure in the program of the next conference, and that in any case the Powers may apply, as far as possible, to "war by sea the principles of the convention relative to the laws and customs of war on land" (No. 4).

The difference between these two classes of *voeu* is, that in the first, the Conference recommends for adoption a certain carefully devised plan, whereas in the latter it expresses the opinion that the Powers should by diplomatic negotiation define and regulate the status of certain classes and property,



and that the laws and customs of naval warfare be included in the program of and be codified by the next conference.

However subtle the distinction between an unsigned declaration, resolution, and *voeu*, the fact is that they all figure among the positive results of the Conference, and, by incorporation in the Final Act, are permanently preserved and sent forth with the approval of the Conference.

Without venturing a positive opinion on a subject which troubled the Conference and which was not resolved by it, it seems that the distinction, however shadowy and subtle in some respects, is sufficiently clear and definite. The proceedings of the Conference are divisible into two classes: (1) Acts of the Conference signed by the plenipotentiaries, which presuppose and require the ratification by the treaty-making power of the participating countries, such as the conventions and the signed declaration; when so ratified these conventions and declarations become acts of the various nations ratifying them and acquire at one and the same time the twofold character of national laws and international obligations. (2) The declaration, resolution and *voeu*, not signed individually and separately by the plenipotentiaries and which neither presuppose nor require ratification by the treaty-making power of the participating countries. However important and complete in themselves they are imperfect in that they remain acts of the Conference, whether they declare the existence of a principle, formulate a resolution, utter an opinion and recommend its adoption in concrete and specific form, or suggest in general terms the desirability of future action of a more or less definite nature in regard to certain specified subjects. They do not create a legal obligation as in the case of the conventions and signed declaration perfected by subsequent ratification; they create at most a moral obligation upon the powers to secure their enactment in appropriate form. They differ among themselves in degree not in kind, and rank according to the importance of the subject, the completeness of the project and the recommendation attached to them. In a word, the convention or signed declaration is a law proposed to the



nations for ratification; the unsigned act is a project for future consideration.

#### 10. THE CLOSING OF THE CONFERENCE

The Second Conference met for the last time on the afternoon of October 18, 1907, at which time several formal addresses were delivered. Of these, two will be noticed: the address of the president, M. de Nelidow, and that of M. van Tets van Goodriaan.

M. de Nelidow opened his address with a summary account of the work which had been accomplished, and, in speaking of the spirit of conciliation which made possible the work of the commissions, especially that of the Third and Fourth Commissions, said:

I shall dwell but an instant on the spirit of concord and understanding which characterized the disposition of all the members of these commissions. When persons unacquainted with our labors judge the work of our Conference, they too often lose sight of the fact that we are not called upon to work out abstract theories, or to seek by speculations of the mind ideal solutions of the problems submitted to us. We are the servants of our governments, and we act by virtue of special instructions based primarily on the interests of our respective countries. The higher considerations of the welfare of humanity in general should without doubt serve as guides to us in this, but we can not help having primarily in view the intentions of our governments when carrying these instructions out. Now the direct interests of the greatest nations are often diametrically opposed. It was in seeking to conciliate them and to bring them into accord with the theoretical requirements of absolute law and justice that the spirit of understanding, which I have just mentioned, was engaged, and, viewed from this light, it acquires a double value.

Passing from the summary of the work accomplished by the various commissions and the Conference, he continued:

However, it is not here, gentlemen, that the chief significance of the Second Peace Conference lies, in my opinion. It can not be denied that one of the chief guaranties of the maintenance of peaceful relations among peoples is a most intimate

knowledge of their reciprocal interests and needs, the establishment of numerous and varied relations, which, being extended more and more, finally creates among them a moral and material solidarity, which is constantly more opposed to any war-like enterprise. The present Conference has accomplished the greatest progress in this regard that humanity has ever made. This is the first time that the representatives of all constituted governments have met for the discussion of interests which are common to them all, and which tend to the welfare of all humanity. Besides this, the association of the representatives of Latin America in our labors has unquestionably added new and very valuable material to the common treasury of international political science, the value of which material was but imperfectly known to us up to the present. The representatives of Central and South America have had occasion, on the other hand, to become better acquainted with the internal situation and the reciprocal relations of the European nations, which, with their various institutions, historically developed, and their traditions and individual peculiarities offer political conditions which are considerably different from those under which the young peoples of the new world live and progress. There was thus an advantage on both sides in this closer acquaintance and in the collaboration to which the Conference gave rise and which will constitute a real progress for humanity.

We can, therefore, deny the charge which it is attempted to make against us by claiming that we have done nothing for the maintenance of peace and nothing for the progress of human solidarity. There is no doubt that there is much yet to be done in this line. The peoples must be educated in such a way as to learn to appreciate and love one another while each preserves its peculiarities and the traditions which are dear to it.

The real friends of peace and of the development of humanity in the direction of moral solidarity, of right and of justice, will not fail to devote themselves to this work with sincerity and good faith. May their efforts serve to counteract the pernicious effects of a certain kind of publicity, the purpose of which is only to excite nations against one another for selfish purposes, stirring up hatred, purposely envenoming the slightest political incidents, and creating or aggravating thereby the dangers which may menace the peace of the world, for the maintenance of which we are called upon to strive.<sup>1</sup>

Before concluding his address, M. de Nelidow expressed his cordial thanks to the delegates and officers of the Conference,

<sup>1</sup> For the text of the address, see *La Deuxième Conférence Internationale de la Paix*, 1907, *Actes et Documents*, Vol I, pp. 586-590.

and proposed a telegram to the Queen of the Netherlands expressing the gratitude of the Conference, and also the telegram to President Roosevelt, previously quoted.<sup>1</sup>

The Dutch minister for Foreign Affairs then closed the Conference with a short speech, in the course of which he offered the hospitality of The Hague to the next Peace Conference, and expressed appreciation for the selection of The Hague as the regular and permanent headquarters of the peace conferences. He concluded his address by proposing the following telegram to the Emperor of Russia:

The Second Peace Conference, at its closing session, very respectfully expresses its deep gratitude to the august initiator and promoter of the humanitarian work of peace on which it has labored under the presidency of Your Majesty's representative.

The Second Conference has passed into history, and we already hear the advance guard of posterity proclaiming on the one hand that it was a failure, and on the other that it was a success. Thirteen international conventions, a signed declaration, a declaration and resolution, and five recommendations, including the important one that a third conference be held, can not be considered as evidences of failure. It may be admitted that the Conference did not fulfill the expectations of the layman and enthusiast; but that it was in any sense a failure, that it was unworthy of its predecessor, that it is unworthy of a successor, can not be admitted for a moment. The mere fact that the representatives of all the civilized nations of the world could meet at one and the same time within the four walls of one and the same room, and for the period of four months exchange views, reconcile differences, discuss questions of grave international concern, and recommend to their respective governments conventions of great and fundamental importance, would alone justify the call and point to the dawning of a new and brighter day.

<sup>1</sup>See p. 111.

The deliberate judgment of our honored Mr. Elihu Root, Secretary of State, will probably be the verdict of posterity:

The work of the Second Hague Conference, presents the greatest advance ever made at any single time toward the reasonable and peaceful regulation of international conduct, unless it be the advance made at The Hague Conference of 1899.

The most valuable result of the Conference of 1899 was that it made the work of the Conference of 1907 possible. The achievements of the conferences justify the belief that the world has entered upon an orderly process through which, step by step, in successive conferences, each taking the work of its predecessor as its point of departure, there may be continual progress toward making the practice of civilized nations conform to their peaceful professions.

## CHAPTER IV

### THE COMPOSITION OF THE CONFERENCE

#### 1. THE PERSONNEL OF THE DELEGATES

Before passing to the detailed consideration of the various conventions concluded at the conferences at The Hague, it may be well to consider the principle of representation, the classification of the delegates, the personnel of some of the important delegations, the influence of the delegations upon the Conference, based upon the standing of the country in the world at large and the impression produced by its delegates at the Conference upon the progress of the work. And, in the next place, it may likewise be not without interest to sketch the unofficial life of the delegate, in order that the Conference at The Hague may become, at least in some measure, a living reality.

An examination of the program submitted for the consideration of the First Conference determines, in large measure, the qualifications necessary for successful work at the Conference; for it will be recalled that the program concerned matters dealing with land and naval warfare, and that Article 8 dealt with the various means by which international difficulties might be settled by peaceful means and war averted. For adequate consideration of land and naval warfare, technical delegates would be indispensable, because the laymen, however willing and however open-minded, could not, without excessive application, understand the necessary technical details, and could not, without great difficulty, choose properly between the various projects submitted.

A humanitarian principle is easily recognized and appreciated by all, but the means by which this humanitarian principle may be applied in warfare on land and sea so as not to



obstruct hostilities, and thus fail of application, can best be appreciated by those experienced in such matters. Therefore, each of the larger States represented at the Conference selected a military delegate and a naval delegate, who, understanding the subject in its technical details, both at home and abroad, could thus speak with authority, and forecast the probable effect of the regulation proposed upon the organization of the home country.

In the next place, it was equally desirable to have present at the conference delegates familiar with the origin and history of arbitration, because arbitration had come to be recognized as the favorite means of adjusting international controversies susceptible of judicial treatment. Therefore, delegates familiar with international law, and, if possible, familiar with the practical conduct of arbitration, would, by their presence and experience, be in a position to suggest proposals likely to meet with the approval of practical people, because they had been engaged with success in actual controversies. If, as actually happened, an arbitration tribunal was to be created, the practical experience of those who had served as arbitrators would be invaluable, and, in drafting procedure for such a tribunal, no safer guide could be found than the rules and regulations previously adopted and found serviceable. The experience of those who framed the rules and applied them would naturally be determinative. Therefore, professors of international law and jurists of experience in arbitration, were selected and appointed by the various States.

And, finally, the very nature of the Conference itself, a diplomatic assemblage in which negotiation plays a leading rôle, necessitated the presence of diplomats by profession, in whose judgment, ability, and character the Conference could place implicit confidence. Such would seem to be, in general, the requirements imposed by theory, and such was, in fact, the actual character of the delegates. The personnel of a few of the delegations of the First and later of the Second Conference will be mentioned, in order to show the exact nature of their composition.

The German delegation was composed of Count Münster, a trained and experienced diplomat, and, at the time of his appointment, Ambassador of Germany to France; Baron von Stengel, professor at the University of Munich, second delegate; Dr. Zorn, professor at the University of Königsberg, and later at Bonn, scientific delegate; Colonel Gross von Schwartzhoff, military expert; and Captain Siegel, Naval Attaché of the German Embassy at Paris, naval delegate. Of this personnel as a whole, Dr. Andrew D. White has said in his interesting Autobiography, so frequently quoted:

It forms a really fine body, its head being Count Münster, whom I have already found very agreeable at Berlin and Paris, and its main authority in the law of nations being Professor Zorn, of the University of Königsberg; but, curiously enough, as if by a whim, the next man on its list is Professor Baron von Stengel<sup>1</sup>, of Munich, who has written a book *against* arbitration; and next to him comes Colonel Schwartzhoff, said to be a man of remarkable ability in military matters, but strongly prejudiced against the Russian proposals.<sup>2</sup>

Austria-Hungary was represented by Count Welsersheimb, a man of large diplomatic experience; M. Gaetan Merey de Kapos-Mere, assistant delegate, who, as first delegate at the Second Conference, greatly distinguished himself; and Dr. Henri Lammasch, professor at the University of Vienna, assistant delegate, who won the confidence and esteem of both conferences, and contributed materially to the results of each.

Belgium was represented by M. Auguste Beernaert, President of the House of Representatives, who, as president of

<sup>1</sup>In the course of the evening one of my European colleagues, who is especially familiar with the inner history of the calling of the conference, told me that the reason why Professor Stengel was made a delegate was not that he wrote the book in praise of war and depreciating arbitration, which caused his appointment to be so unfavorably commented upon, but because, as an eminent professor of international law, he represented Bavaria; and that as Bavaria, though represented at St. Petersburg, was not invited, it was thought very essential that a well known man from that kingdom should be put into the general German delegation.—Dr. White in his Autobiography, Vol. II, p. 284.

<sup>2</sup> Ibid., p. 259.

the First Commission in the First Conference, and as president of the Second Commission in the Second Conference, contributed materially to the success of the conferences; and M. Descamps, Senator, who, as an expert in arbitration, and as reporter of the Third Commission, to which Article 8 of the program was referred, rendered services of the greatest value.

The American delegation was composed of Dr. Andrew D. White, American Ambassador at Berlin; Mr. Seth Low, President of Columbia University, a gentleman of large educational and political experience; Mr. Stanford Newel, American Minister to The Hague; Captain Alfred T. Mahan, naval delegate, whose experiences in the Navy, in war as well as in peace, technically qualified him for the position, and whose works upon naval warfare are among the masterpieces of the century; Captain Crozier, military delegate, whose career at The Hague marked him for the promotion with which he was rewarded; and Mr. Frederick W. Holls, delegate and secretary of the delegation, whose experience as a lawyer, interest in arbitration, and profound ability, made him at once a power in the Conference, and whose rôle was hardly second to that of any in producing the Convention for the Peaceful Adjustment of International Difficulties. It is a source of pride to note the respect in which Mr. Holls was regarded by his colleagues of the First Conference, and that his memory was cherished as a precious tradition by the members of the Second Conference. The adopted son of the great Republic shed a luster upon it vouchsafed to few in so short and busy a life.

Of the French delegation, the following may be mentioned: M. Léon Bourgeois, former Prime Minister and Minister of Foreign Affairs, former President of the Chamber of Deputies; Baron d'Estournelles de Constant, member of the Chamber of Deputies and constant friend and promoter of arbitration, whose kindness and courtesy, as well as linguistic ability, enabled him to perform great, indeed invaluable services; and Professor Louis Renault, professor in the Paris Law School, legal adviser to the Ministry of Foreign Affairs, whose wide knowledge of international law, and technical familiarity

with all branches of public law made him a safe and sure guide in the Conference and in the smaller committees charged with the preparation of important documents.

The British delegation was headed, and the Conference was at times dominated, by Sir Julian Pauncefoot, to whom in large measure is due the creation of the Permanent Court. He was admirably seconded in the naval and military sections of the program by Admiral Sir John A. Fisher, naval delegate, and by General Sir J. C. Ardagh, military delegate.

The Italian delegation was represented by Count Nigra, the Italian Ambassador at Vienna and Senator of the Kingdom, once the private secretary of Cavour, and whose diplomatic services in France during the régime of Napoleon III, counted for much in the unification of Italy.

Holland was admirably represented by Jonkheer Van Karnebeek, former Minister of Foreign Affairs, Vice-President of the Conference, whose services as reporter and intermediary were of great and permanent value. M. Asser brought to the Conference a trained knowledge in private and public international law, and his experience as arbiter in international controversies enabled him to speak with authority on these subjects.

Russia, as was expected, was strongly represented: its first delegate, Baron de Staal, Ambassador to the Court of St. James, was not only first delegate of his country, but President of the Conference, and although inexperienced in parliamentary procedure, his large experience in public affairs, his genuine interest in and sympathy with the aims of the Conference, and his kindly demeanor, endeared him to his colleagues and earned him the sobriquet of "Father" Staal; M. de Martens, well known as an author of a great and comprehensive treatise on international law, whose experience and ability in matters of arbitration has caused him to be called the "Chief Justice of Christendom;" Colonel Gilinsky, military delegate, upon whom devolved the burden and the privilege of explaining and defending the military proposals of Russia; and Captain Scheine, naval delegate, specially charged with the



conduct of the naval proposals. The delegation likewise included M. Ovtchinnikow, Professor of Jurisprudence, whose services as technical delegate were placed at the disposal of the Conference.

Each power was left absolute liberty both as to the qualifications as well as to the number of delegates chosen by it to attend the Conference, and while each State invited to the Conference possessed but a single vote, the size of the delegation depended somewhat either upon the real or fancied importance of the power, and the interest it took or might seem to take in the success of the Conference. Thus, Montenegro was represented by Russia, and Greece sent one delegate; Bulgaria, Denmark, Luxemburg, Mexico and Persia, two; Belgium, Roumania, Servia and Switzerland, three; China, Siam and Turkey, four; Germany, Great Britain, Holland, Italy, Japan, Portugal, Sweden and Norway, five; Austria-Hungary, France and the United States, six; Russia, eight. The large number of secretaries (6) attending the French delegation was justified, not merely by the importance of France and the rôle it naturally would take, but by the fact that the language of the Conference being French, the presence of a number of capable and efficient French secretaries would add greatly to the conduct of the proceedings and the accuracy of the reports. Russia was represented by eight delegates and five secretaries, the largest representation of the Conference, but this number could not be considered excessive; for the delegates represented Montenegro as well, and the duty of presenting and expounding the Russian projects made it seem desirable that the Russian delegation should be equal, intellectually and physically, to the great and self-imposed burden of calling and directing the Conference.<sup>1</sup>

The delegates were not all of equal rank. The plenipotentiaries represented the sovereignty of the appointing State, and formed what may be called the first or highest class. The

<sup>1</sup> For the names of the Delegates, see Final Act of First Conference, Vol. II, pp. 63-77.



States were likewise unlimited in the number of plenipotentiaries and designated one or more in accordance with what were conceived to be their best interests, for example: Germany, China, Greece, Persia, and Sweden and Norway contented themselves with one plenipotentiary each; Austria-Hungary, Denmark, Great Britain, Japan, Roumania, Servia, Siam, Switzerland, and Turkey, each selected two; both of the Mexican, Luxemburg, and Belgian delegates were plenipotentiaries; Belgium, Spain, Italy, Portugal and Russia had each three plenipotentiaries; France and Holland, four; whereas the United States of America appointed five. In such cases, the delegates were known as the first, second, third, fourth or fifth delegates.

The second class of delegates consisted of the military and naval experts, and the experts in international law, known respectively as the technical and scientific delegates. The scientific delegates were, generally speaking, jurists who had already distinguished themselves in the domain of international law. Meurer, in his elaborate work on the Peace Conference, indicates the following as especially distinguished:

Zorn, of Germany; Lammasch, of Austria; Holls, of the United States; Renault, of France; Veljkovitch, of Servia; and Consul General Rolin, of Belgium. In this class of scientific exponents of international law belong likewise the plenipotentiaries de Martens, of Russia, Asser, of Holland, and Descamps, of Belgium. Among the military delegates the following were especially prominent in the later proceedings: Colonel Gross von Schwarzhoff, of Germany; Lieutenant-Colonel von Kuepech, of Austria; Captain Crozier, of America; General Mounier, of France; Major-General John Ardagh, of Great Britain; Major-General Zuccari, of Italy; and Colonel Gilinsky, of Russia. To this class also belongs the plenipotentiary den Beer Portugael, formerly Dutch Minister of War. In naval matters the following naval delegates especially distinguished themselves: Captain Siegel, of Germany; Count Soltyk, of Austria-Hungary; Rear-Admiral Pephau, of France; Vice-Admiral Fisher, of Great Britain; Captain Tadema, of Holland; and Captain Scheine, of Russia. In this group Captain Mahan, plenipotentiary of the United States, is likewise to be mentioned.<sup>1</sup>

<sup>1</sup> Meurer's *Haager Friedenskonferenz*, Vol. I, p. 23.

A third group, not really delegates, was composed of the secretaries of the delegations. Most delegations had their own secretaries; Germany, for example, had one, while Austria-Hungary had four assistant delegates, but no secretary. The following States had no specially appointed secretaries: China (China had, however, an interpreter), Mexico, Luxemburg, Holland, Roumania, Servia and Bulgaria. Attachés or ministerial secretaries with the duty of secretary were attached to the following delegations: Denmark, Greece and Siam.

It is thus seen that while the invited States were left untrammelled in the choice of delegates, and while no limitation was placed either upon the number or qualification of the representatives chosen, nevertheless the aim and purpose of the Conference, as well as experience in the past, imposed limitations both as to the number and qualifications of the delegates. Differing in numbers and in experience, the States were represented by plenipotentiaries, scientific and technical delegates, and secretaries, who, in the course of the Conference, represented their respective countries and the national interests confided to them with remarkable ability and success.

The late Mr. Holls, in his admirable account of the First Conference, characterizes the leading delegates as he had learned to know them at The Hague, and the pleasure of association, in the following happy language:

To listen to the diplomatic wisdom of veteran statesmen like Baron de Staal, Count Nigra, and Lord Pauncetote; to hear the profoundest problems of International Law debated thoroughly and most brilliantly by authorities like De Martens, Asser, Descamps, Lammasch, and Zorn; to observe the noble idealism of Baron d'Estournelles, the sound judgment of M. de Basily and Jonkheer van Karnebeek, and the unerring prudence of Switzerland's efficient representative, M. Odier,—and finally, to watch the perfection of decision and tact in the firm but most amiable management of all these various elements by the chairman, M. Bourgeois,—all this would in itself be of sufficient general interest to deserve an enduring record. Unfortunately, this is impossible, for in the absence of a stenographic report, by far the greater and better part of the debates—the animated discussions—are necessarily lost. The admirable *procès-verbaux* of Baron d'Estournelles summarize most accu-

rately the action taken, as well as many of the speeches made, and they, together with the present writer's own recollections and memoranda, form the basis of most of the narrative which is hereinafter given, under the appropriate article.<sup>1</sup>

In forming an estimate of the personalities of the First Conference, I have relied principally upon the notices found in Dr. White's delightful Autobiography, and Mr. Holls' authoritative volume upon the Peace Conference. As it seems, advisable, however, to view the Conference through continental eyes, I translate and quote the following paragraphs from Professor Meurer's elaborate work on the First Hague Conference, which has already been laid under contribution:

Even the secondary Powers, as the German plenipotentiary Zorn afterwards publicly remarked, had very shrewd and intelligent representatives, such as the former Belgian Minister of State Beernaert, and the Dutch Councillor of State (now Minister) Asser, the former of whom was characterized by his devout enthusiasm for right and the latter as a sober-minded, acute, practical politician, who possessed an excellent knowledge of international law and was imbued with an enthusiasm for the pacific mission of international law similar to that of the honored and respected Belgian Descamps, who prepared the celebrated Memorial to the Powers, for the Brussels Inter-parliamentary Conference in 1895.

The "original advocate of the idea of peace," and, so to speak, the father of the permanent tribunal of arbitration, was the English First Plenipotentiary, Sir Julian Pauncefote, Ambassador at Washington.

Pauncefote had already played a leading rôle twice in the history of the peace movement. He brought about the draft of the English-American arbitration treaty in 1897. This was the first of all the treaties regarding a tribunal of arbitration, though it was not ratified by the United States because three votes were lacking in order to make up the legal two-thirds majority in the Senate. Sir Pauncefote gave another sample of practical peace policy when war was imminent between England and America on account of the Venezuela question. He succeeded in that instance in bringing the dispute before a tribunal of arbitration, which sat at Paris under the presidency of *on* Martens at the time of the Conference.

The American delegation was headed by Mr. White, who is well known throughout extensive circles and greatly respected,

<sup>1</sup> Holls' *Peace Conference*, pp. 172-173.

and who was Ambassador at Berlin at the time. Assisting him were a number of distinguished and interesting personalities, among them being the prominent naval author Mahan and an extremely alert lawyer, the German-American Holls.

Conspicuous in the transactions is the Russian university professor and privy councillor, von Martens, who is so well known to the professional student of international law by his numerous works on this subject, and who conducted the proceedings of the second commission and of the second sub-commission with the greatest skill, besides taking an active part in all commissions and on all questions by his suggestions and assistance, while at the same time holding the office of president of the arbitration court at Paris.

We admire the warm-hearted eloquence, parliamentary skill, and broad-minded statesmanship of the former French prime minister and later President of the Chamber of Deputies, Bourgeois, who was the youngest of the heads of delegations to The Hague, and who would have become Minister again during the continuance of The Hague Conference, but refused on account of his duties at The Hague. He not only presided in an admirable manner over the Third Commission, which was the largest and unquestionably the most important one, but also exerted an influence over the other commissions by smoothing over conflicts of opinion, and, when a deadlock occurred, in the proceedings, by referring the question to a committee where he attended to the matter skillfully and successfully, "rather energetically than diplomatically," and "with tact and firmness." He was supported by very prominent representatives of the army and navy (Mounier and Pephau), as well as by a first-class authority on international law (Renault).

The parliamentary skill of the French plenipotentiary found its counterpart in the diplomatic facility with which the chief plenipotentiary of Italy, Count Nigra, overcame the difficulties which arose in the proceedings. He was, so to speak, also the dean for the preservation of diplomatic tradition and international comity, and everywhere lent earnest, zealous coöperation.

The tenacious idealism of the French deputy, d'Estournelles de Constant, who was afterwards referred to by another plenipotentiary as "one of the most attractive and genial personalities in the conference," acted like a captivating sermon.

On the contrary, the German Colonel Gross v. Schwarzhoff, whose tragic death during the conflagration at Peking is still fresh in our minds, distinguished himself by his soldierlike frankness and determination, while Professor Zorn, the scientific delegate of Germany, won recognition through the scientific significance, warmth and forcefulness of his deliverances. Then there was his Austrian colleague, Dr. Lammasch, a univer-



sity professor, whose sincere and zealous efforts in securing compromises won him a place of honor among the members of the Conference.

Laboring in the Peace Conference alongside statesmen and diplomats who had a brilliant career behind them, and alongside prominent representatives of the army and navy, were to be noted also eminent representatives of the science of international law.

It was of great benefit to the proceedings of the Conference that such jurists as v. Martens, Renault, Lammassch, Zorn, Asser, Descamps and Rolin were invited to attend. An appropriate lesson had been derived from the Geneva Conference of 1864, which had dispensed with professional legal assistance, and this lesson was confirmed at the Brussels Conference of 1874, in which jurists coöperated.

Beside the Presidents of the Conference, of the Commissions and Sub-commissions, the following reporters were naturally conspicuous: Count Soltyk, den Beer Portugael, van Karnebeek, Renault, Rolin and Descamps. President v. Staal was right when, in his concluding address, he called their works masterpieces which would continue to be an authoritative commentary.

Of course the plenipotentiaries had but to talk and vote in accordance with their instructions, but strong personalities will always stand forth in every gathering. As the Conference itself had begun in an entirely unprepared state, the main part of the proceedings were carried out without instructions, and in this manner the individual skill of the plenipotentiaries showed itself to better advantage. Purely personal declarations and ballots ad referendum were the rule for a long time.

The diversity of the nations showed itself plainly in the addresses, the brilliant rhetoric of the Latin, eliciting loud applause, while the sober criticism of the Teuton also had its effect.<sup>1</sup>

It has been seen that the Second Conference followed in general the procedure adopted by the first, and it may be said that the personnel of the second corresponded in like manner to the personnel of the first, for the twofold reason that the nature of the Conference required it, and the precedent of 1899 was too persuasive not to be followed. The plenipotentiaries of the first Conference were, as a rule, men who had grown old in the public service, and who had won enviable reputations as

<sup>1</sup> Meurer's *Haager Friedenskonferenz*, Vol. I, pp. 2-5.



diplomats, statesmen, and leaders of public opinion. The Second Conference likewise resembled the first, in that the first delegates were chosen from the same general classes. They were, of course, much more numerous, because instead of twenty-six States represented, forty-four appointed delegates who took part in the work, and a forty-fifth delegation was admitted just before the close of the Conference. In the First Conference, Europe and certain parts of Asia and America were represented, to the exclusion of Latin-America, unless Mexico be regarded as their representative. In the Second Conference, the Latin-American States were invited, and, with two exceptions, responded. We have, then, a Conference international in fact as well as in theory, capable of legislating *ad referendum* for the world, because all States recognizing and applying international law were invited, and, with the exception of Costa Rica and Honduras, participated in the Conference. The assembly, therefore, was geographically international as well as international in the legal sense of the word. The various phases of our civilization, the various traditions of the past, the various systems of government, as well as of law, and the various languages which composed this modern babel, gave a unique character to this first truly international assembly.

Following the method adopted in describing the personnel of the First Conference, I mention some of the larger and representative delegations, in the order of their names in French.

Germany's first plenipotentiary was Baron Marschall von Bieberstein, Ambassador at Constantinople, a lawyer by profession, and jurist by training, seven years Minister of Foreign Affairs, and for the past ten years Ambassador in the storm-center of European politics. He brought to the Conference a great intellect, supported by a great physique, and both in experience and in his person fitted to dominate an international assembly. M. Kriege, the second German plenipotentiary, occupies the position of assistant legal adviser to the Department of Foreign Affairs. Statecraft is not his forte;

the traditional insincerity and indirection of diplomacy are foreign to his manly and upright, though somewhat unyielding nature. His training is that of a lawyer, his view is that of his profession, and he follows, to use a happy phrase of my Lord Coke, "the gladsome light of jurisprudence" whithersoever it leads. Vice-Admiral Siegel, the naval delegate, added to the reputation of 1899. General von Gündell, the military delegate, won confidence by the straight-forwardness and sincerity of his views, as well as by his genial personality. Dr. Zorn, who immortalized himself in the First Conference as scientific delegate, was present, but was not permitted by his delegation, for reasons which a foreigner can not well discuss, to take that part in the Conference which his abilities, measured by past achievement, would have suggested. The German delegation,—leaving out an efficient minor personnel, really assistants to the delegation rather than aids to the Conference,—was thus composed of a first and second plenipotentiary, of a naval, military and scientific delegate. This may be considered as the typical delegation: neither too large nor too small for the labor imposed upon it. Each delegate had his appropriate sphere of action, and was qualified for it. There was no waste personnel, and it is probable that the delegations of the future will follow the German model, and be limited to the minimum requirement; for experience suggests that large delegations in a representative international assembly are cumbersome without any compensating increase of efficiency.

The American delegation was composed of seven plenipotentiaries and two technical delegates, and the delegation as a whole is susceptible of a threefold division: First, the ambassadors, three in number: Joseph H. Choate: first plenipotentiary, General Horace Porter, second plenipotentiary, and Uriah M. Rose, third plenipotentiary; second, the plenipotentiaries without the rank of ambassador, divisible into two groups, of whom Mr. David Jayne Hill and William I. Buchanan, whose mission was general, comprise the first group, and Rear-Admiral Sperry and General George B. Davis, respectively naval and military delegate, comprise the sec-

ond; third, the technical delegates, James Brown Scott, technical delegate and expert in international law, and Charles Henry Butler, expert attaché and technical delegate. This delegation is typical of the maximum as the German is typical of the minimum.

Continuing the examination of types, two Latin-American delegations will be considered in their alphabetical order,—first, the Argentine Republic, and second, Brazil.

The Argentine Republic sent five delegates, of whom three were plenipotentiaries and two technical delegates. The personnel of the Argentine delegation was remarkable in all respects for the distinguished public position previously occupied by its members, for example: the plenipotentiaries MM. Saenz Peña, Drago, and Larreta, had been Ministers of Foreign Affairs. General Reynolds, the military delegate, was Inspector General of the Army and Military Attaché at Berlin. Captain Martin, naval delegate, was former Minister of Marine and Naval Attaché at London. No country selected a more distinguished and more capable delegation.

Brazil's first plenipotentiary, M. Ruy Barbosa, had the rank of Ambassador. The second plenipotentiary was M. Lisboa, Brazilian Minister to The Hague. The military and naval delegates, Colonel de Almeida and Captain Burlamaqui de Moura, were qualified by experience in their various branches of the service to represent the military and naval policies of their country. The great and distinguished rôle of M. Barbosa, which made him a leading personality of the Conference, will be mentioned later.

Turning now to the Austrian delegation, we find it headed by an Ambassador, M. Gaetan Merey de Kapos-Mere, who distinguished himself as a ready debater and as a leader of great boldness, shrewdness, assurance, and force, particularly in the later proceedings of the Conference. The scientific delegate was Dr. Henri Lammasch, professor at the University of Vienna, who, as previously stated, won the respect and admiration of his colleagues by his profound knowledge, gentleness of manner, and sympathy with the aims of the

Conference. Both of these delegates had previously represented their country in the First Conference.

Belgium was represented by M. Beernaert, who, as President of the First Commission of 1899, rendered great service to the Conference, and as President of the Second Commission of the Second Conference, sustained a great and worthy reputation. M. van den Heuvel, the second plenipotentiary, had been Minister of Justice, and brought to the Conference trained legal capacity, great subtlety of mind and fertility of resources, and a happy and incisive phrase which greatly enlivened the proceedings; indeed, one of his addresses in which he enforced his views by a reference to "two et ceteras" as enlarging the scope of the program, was one of the hits of the Conference. The third plenipotentiary, Baron Guillaume, Minister to The Hague, was reporter of the First Commission in succession to Baron Descamps, and his elaborate report on the work of the commission will long be consulted by student and scholar.

China was represented by an Ambassador, M. Lou Tsêng-Tsiang, and by the Hon. John W. Foster, plenipotentiary, who, after a long and honorable career, culminating in the Secretaryship of State of the United States, achieved solid and permanent distinction in the tortuous paths of celestial diplomacy.

No delegation was more adequately represented than the French delegation, at whose head was M. Léon Bourgeois, first plenipotentiary and President of the First Commission, who, by his persuasiveness and profound interest in the purposes of the Conference, achieved a world-wide reputation in the First Conference, which he worthily sustained—it could not be enhanced—in the second. The second plenipotentiary was Baron d'Estournelles de Constant, who likewise rendered the same valuable services in the second which he performed in the first. As Secretary of the Third Commission of 1899, as Secretary of the First Commission of 1907, as intermediary between divergent and seemingly irreconcilable views, as translator of the various addresses delivered in English, he brought the delegates into close touch and was, in a word, the



embodiment of the gentleness and hope appropriate to a peace conference. M. Louis Renault, professor at the Paris Law School, Legal Adviser to the Ministry of Foreign Affairs, was the third plenipotentiary. At the beginning of the Conference he ably and tactfully represented the views of his delegation. As reporter of various commissions, as president of the small editing or drafting committee, he gave to the various projects clearness of form, elegance of language, and that legal setting necessary to international documents. The military delegate was General of Division Amourel, the naval delegate Vice-Admiral Arago, both equal to the responsibilities of their position. M. Henri Fromageot, technical delegate, brought to the Conference the trained mind of the lawyer, and as reporter of the Fourth Commission and its official translator, he rendered services of the greatest value. It is not given to many young men to acquire in so short a time such a solid reputation and so many titles to remembrance; but above all, his honesty of purpose, his gentleness of manner, his transparent sincerity, not only engendered personal affection, but reflected credit on his country.

The British delegation was a large one, and was headed by Sir Edward Fry as Ambassador. Sir Edward was the Nestor of the Conference, turned eighty. Trained for the bar, and having won distinction as a lawyer, as judge, and as Lord Justice, he evidently preferred the simplicity and directness of the court-room to the dilatory and tortuous methods of diplomacy. A lifetime spent at the bar and on the bench lent peculiar weight in discussions of a legal nature, and his short and weighty sentences, as befitting a judge, were always listened to with respect. Sir Ernest Satow, Lord Reay, and Sir Henry Howard, respectively second, third, and fourth plenipotentiaries, were able coadjutors. Mr. Eyre Crowe and Mr. Cecil Hurst, technical delegates, commanded universal respect, and if their work, mostly in the small committees, had been on the floor of the commission, it would have given them international standing.

The Italian delegation conformed to the minimum type.



Count Tornielli, first plenipotentiary, was president of the Italian delegation, and as President of the Third Commission, succeeded in impressing it with his views and bringing them in large measure to realization. M. Fusinato, formerly Minister of Public Instruction, while ordinarily silent in the commission,—due, no doubt, to Tornielli's desire to represent Italy on all occasions,—displayed his wonderful vivacity and fertility of resource in the Committee of Examination of which he was a member, and as President of the Committee of Examination C, charged with the revision of the Convention of 1899 for the Peaceful Adjustment of International Differences, he displayed the rare qualities of a trained lawyer and man of affairs.

The Japanese delegation was headed by M. Keiroku Tsudzuki, with the rank of Ambassador, who, in conference, commission, and committee, represented his country and its special interests with admirable tact and dignity, using as occasion required, French or English with equal facility and telling effect. It was noticeable that he commended even when he did not vote, and that his favorite method of expressing dissent was not by a negative vote, but by abstention, in order that his country might have further time for reflection.

Norway made its first appearance as an independent nation at the Second Conference, and Francis Hagerup, former Prime Minister to The Hague, made a distinct impression at the opening of the Conference, which he maintained until its conclusion. As President of the First Sub-Commission of the Third Commission, he contributed materially to its labors, and took a leading part in the labors of the Conference. The technical delegate, Mr. Lange, won the confidence and respect of his colleagues, and his command of clear thought and mastery of an idiomatic and admirable French caused him to be listened to with respect, both in the commission and in the committees of which he was a member.

The Dutch delegation was naturally large, because while the Conference was called by Russia and dominated by it,

Holland, as the seat of the Conference, was charged in great part with administrative details. M. de Beaufort, former Minister of Foreign Affairs, was first plenipotentiary; M. Asser, a power in the First Conference, was a leading personality of the second, and his profound knowledge of international law, public and private, as well as his experience as arbitrator in international conflicts, added point and weight to his frequent intervention. Jonkheer Den Beer Poortugael, former Minister of War, and member of the First Conference, made himself the mouthpiece of enlightened and humanitarian views. Admiral Roell, former Minister of Marine, took an active part in naval matters and represented worthily the views of his country. The same may be said of M. Loeff, former Minister of Justice, M. van Karnebeek, assistant delegate, who as reporter and master of the modern languages, rapidly and gracefully translated in case of need.

The Portuguese delegation conformed to the minimum type, three plenipotentiaries and two technical delegates, but its head, the Marquis de Soveral, with the rank of Ambassador, and M. d'Oliveira played a very leading and honorable part in all discussions concerning arbitration.

The Roumanian delegation consisted of two plenipotentiaries and a technical delegate. M. Beldiman, the first plenipotentiary, impressed himself on the Conference, albeit his attitude was largely one of opposition.

The rôle of Russia at the Conference was very distinguished although it can not be said that it was as commanding as in 1899. The reason for that lies perhaps in the fact that the First Conference was an experiment and largely under the tutelage of the proposer, whereas the Second Conference was large and conscious of its world-wide representation and significance. M. de Nelidow, Ambassador of Russia at Paris, and first plenipotentiary, was President of the Conference. Although not a member of the First Conference, his views on mediation were incorporated by Mr. Holls into the "Convention for the Peaceful Adjustment of International Disputes." Although in poor health, he presided in person at the Confer-

ence, attended the various commissions, and was a constant visitor in the committees. If he did not enjoy the influence of his predecessor, M. de Staal, this may be attributed in part to his broken health, and to a certain distance which suggested to the uninitiated indifference to the aims and purposes of the Conference. The *procès-verbaux* however testify to an unvarying dignity of thought and expression, and his appeals to the delegates at important and crucial moments showed that he appreciated to the full the importance of his position. The second plenipotentiary was M. de Martens, whose presence in international conferences is a guarantee at once for careful and profound preparation, for sympathy with the purposes of the Conference, and a desire to terminate its proceedings with substantial results. He was listened to, I am told by members of the First Conference, with open-mouthed interest, and his services to arbitration, to the Commission of Inquiry, and in establishing the Permanent Court, have given him a permanent reputation and placed him high among the benefactors of international justice. If he did not, in the Second Conference, live up to a reputation already acquired, this is due undoubtedly to the fact that he suffered from gout and was often confined to his room. M. Tcharykow, third plenipotentiary and Minister to The Hague, was usually the mouthpiece of the Russian delegation in commissions, and in admirable and concise French explained the views of his country. M. Prozor, technical delegate, as editor of the *procès-verbaux*, rendered substantial and enduring services. His charm of manner, his evident desire to be of service, will not be forgotten by those who came in contact with him. The naval and military delegates played a less important rôle in the Conference, because by general agreement, disarmament was not the burning issue at the Conference, for armament rather than disarmament seemed a cardinal principle of Russian policy at the Second Conference.

Sweden was represented by M. Hammerskjöld as first delegate. As former Minister of Justice and as member of the Permanent Court of Arbitration, he was peculiarly qualified

and genuinely interested in the cause of arbitration. His influence in the committee was great, and always used to advance the cause of progress.

Switzerland was represented by three plenipotentiaries, one of whom, M. Carlin, looked after the interests of the Federation with great persistence. Colonel Borel, as reporter of the Second Sub-Commission of the Second Commission, and as frequent speaker in the commission, held the attention and commanded the respect of the Conference, as did also Professor Huber upon the rare occasions on which he addressed the Conference.

Such, in general, was the composition of the delegations of the Second Conference.

## 2. INFLUENCE OF VARIOUS DELEGATIONS AND DELEGATES

The States represented at the Conference were regarded as equals, and rightly so, for equality of States is the postulate of international law. As Chief Justice Marshall happily phrased it in the case of *The Antelope*,

No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. Its results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all can be divested only by consent;—as no nation can prescribe a rule for others, none can make a law of nations.<sup>1</sup>

Accepting this terse statement as unquestioned law, it follows that each nation represented at the Conference, be it or its delegation large or small, should vote as an equal on all questions before the Conference; but while we all freely admit the equality of States before the law, experience shows us that the influence possessed by States varies

<sup>1</sup> Case of *The Antelope* (1825), 10 Wheaton, 66, 122.



just as the influence of a man who is, in legal parlance, the equal of his fellow. It follows, therefore, that while all States are legally equal, still in this practical world of ours we must not, or at least we can not, ignore the historic fact that nations exercise an influence upon the world's affairs commensurate with their traditions, their industry, their commerce, and their present ability to safeguard their rights. It follows from this that though equal in theory, their influence is often unequal in practice. Again, we know that just as men specialize in certain professions, and acquire a standing by so doing, certain nations, whether from their geographical situation or from the development of industry and commerce, or from military and intellectual predominance, acquire an influence which others not so circumstanced fail to possess. The recognition of this is not the recognition of inequality; it is a recognition of facts as they actually are, which can not be overlooked in seeking to establish permanent institutions. Thus, for example, a country with no seacoast, while it may have large commercial interests, and while its views upon maritime warfare are sound and deserving of respect, can not expect that its vote on a question of maritime law be received in an international assembly with the same influence as the vote of a great maritime power would be. In other words, while Russia and Geneva are equal, in maritime matters, Russia and Switzerland do not stand upon the same plane of equality. It also follows that as no nation can legislate for another, the powers of large maritime interests will not permit the votes of interior countries to dictate or prejudice their maritime interests. Therefore, a proposed maritime reform can not well be carried, even if the vote be overwhelmingly in its favor, if Great Britain, France, Russia and Japan be opposed to its realization. As an example of this may be cited the American project for the abolition of the capture of unoffending enemy property upon the high seas. The four powers mentioned declared against it, and as the Conference is a diplomatic assembly, not a parliament, the project was wisely dropped. A more extreme illustration of



the influence of certain maritime powers is furnished by the failure of the British proposition involving the abolition of contraband, which Germany, France, Russia and the United States opposed. In the same way, the attitude of Germany in matters of land warfare would be determinative, and the Conference shows that the opposition of Germany aided and abetted a small minority to a general treaty of arbitration, notwithstanding an overwhelming vote in its favor, blocked the will of the Conference. For the purpose of the Conference is not to negotiate conventions which some may, but which all must observe, and therefore powers most deeply involved and interested in the outcome must agree in advance to the proposition and pledge themselves faithfully to execute it when voted. It is abundantly clear, therefore, that the delegations at The Hague did not and could not possess equal influence in framing the conventions, and that, notwithstanding the principle of legal equality the larger States either forced their views upon the Conference or by their opposition prevented an unacceptable proposition from being accepted. It is, however, by means of the equality of the States that the minority was thus enabled to constrain the majority. I beg to quote the views of M. Renault upon the principle of equality and the useful rôle of the smaller States at international conferences.

There is the opportunity for small States to take a very useful part provided their action be spontaneous and disinterested. They above all are better able to support just causes, first, because they are not strong enough to carry unjust causes through. They then serve as a connecting link; they find means of bringing harmony into the conflicting views of the Great Powers. Some of the delegates have done yeoman's service in that direction.

The Conference was based on the idea, an essential one, I grant, that the States are juridically equal. They are all sovereigns, equal in law, etc. Yet facts must also be taken into account, better tact and a truer notion of the actual situation must at times come into play.

Now juridically equality among States, if taken literally, leads to absurd conclusions. This we must have the courage to say.

I will take an instance which I trust will not hurt any sensibilities even if there be in this hall persons belonging to the small nations I am about to mention. Can it be admitted that in a question of maritime law the vote of the Grand Duchy of Luxemburg or even of Montenegro shall have as much weight as that of Great Britain? Could those small countries, on the plea of unanimity, block reforms upon which the great maritime powers are agreed?

Small States often misapprehend their own interests. They think that obstinacy, I would not use the word obstruction, affords the best means of asserting their independence, and they take the risk of jeopardizing the success of the Conferences, which nevertheless are of so great benefit to them, by not taking sufficient notice of the majority's opinion. In those meetings, I wish to repeat it, they find the invaluable opportunity to obtain a hearing, to claim what they consider fair, to arouse the sympathy of great States which will offset the fears inspired by powerful neighbors.<sup>1</sup>

It is seen, therefore, that some delegations possessed more influence in the Conference than others, and it is equally capable of demonstration that certain delegates, whether representatives of leading delegations or by virtue of their character and ability, enjoyed greater distinction than others and profoundly influenced the proceedings. It is likewise susceptible of demonstration that certain delegates, irrespective of their delegations, enjoyed a degree of personal confidence which counted for much in the development and work of the Conference. It is true that the delegate spoke as representative of a state, although at one and the same time he may have represented his individual views, and it is a fact that these views expressed with clearness and persuasiveness of manner deeply impressed the delegates, who, unless positively instructed by their Governments, rallied to the support of a proposition which appealed to their judgment, and it is also a fact that

<sup>1</sup> The Work of The Hague, 1899, 1907, a lecture delivered by Professor Renault, June 5, 1908, in the School of the Political Sciences. Printed in the *Annales des Sciences Politiques* for July 15, 1908, and published in pamphlet form by Félix Alcan, Paris, 1908. The quotation is taken from pp. 16-17 of the pamphlet. See also Professor Renault's restatement of his views in an address on the Work of The Hague in 1899 and 1907, delivered at Kristiania, May 18, 1908, before the Nobel Institute.

these personal convictions, transmitted to their respective Governments, resulted, on various occasions, in obtaining instructions from the home Governments which permitted the delegates to vote according to the convictions developed in the Conference. A most remarkable instance of the effect produced by a commanding personality is that of M. Bourgeois, who by persuasiveness and the force of argument, secured the reference of the project for an arbitral court of justice to the Committee of Examination, and whose unwavering support and conciliatory attitude in the committee caused it to be accepted by the commission, and ultimately voted by the Conference. It is likewise true that M. Bourgeois's support of obligatory arbitration of carefully selected topics secured a majority in favor of his project, although many of the delegates preferred a general treaty of arbitration, with the time-honored reserves of independence, vital interest and honor. It is also a fact that the conciliatory attitude of Mr. Choate in the matter of the establishment of a prize court, and his intervention as mediator between the German and British delegations, resulted in a modified proposition, which eventually proved acceptable to both delegations, and is embodied in the Convention for the Establishment of a Prize Court.<sup>1</sup> It is no less true that the attitude of Marschall von Bieberstein on all occasions carried great weight, not merely because he spoke as the representa-

<sup>1</sup>It is not for a subordinate of the American delegation to sound the praises of his chief. Mr. John W. Foster, an eye-witness of the Conference, has expressed himself with great precision on Mr. Choate's rôle at the Conference, and I therefore quote his measured opinion in full. Mr. Foster says:

"The person who gained the most reputation out of the Conference was Mr. Choate, the head of the American delegation. He was much handicapped by his imperfect knowledge of the French language, but his ability as a speaker was recognized early in the sessions. His long training at the bar, his political and diplomatic experience, his courtly address, and his ready wit, admirably fitted him for the important rôle he had to play. The American delegation presented more important and controverted propositions than any [other delegation, and Mr. Choate . . . had the chief burden to bear in their defense. In the discharge of this duty he antagonized able men in the opposition, but he never lost the respect and esteem of the delegates."

tive of a great power, but because he spoke as a great diplomat, experienced in parliamentary practice as well as in difficult and subtle negotiations. Had he supported a general treaty of arbitration, as at one time seemed probable, he would have been, without doubt, the dominating figure from the opening to the close of the Conference, because he would have expressed in his person the hopes and aspirations of the Conference, and would have forced their realization. At all times he was a great and admired figure, who never ceased to arouse interest, although he failed to command implicit confidence by reason of his attitude on arbitration. There were, however, three personalities at the Conference that impressed it by virtue of their character and ability, irrespective of the weight naturally attributable to their respective delegations. I refer to Dr. Drago, M. Barbosa, and M. Renault.

Dr. Drago appeared for the first time in an international conference, and the country which he so worthily represented likewise made its appearance for the first time in a great international assembly. Dr. Drago's name is inseparably linked with the proposition for the limitation of force in the collection of contract debts. He formulated this doctrine in extreme form in a much-celebrated note, dated December 29, 1902. The American project introduced by General Porter was more moderate in form and expression than Drago's, yet he cheerfully supported it, and it was due to his energy, straightforwardness and influence with the delegations of Latin-America that it was eventually accepted. Their confidence in him led them to accept his leadership, and the limitation of force in the collection of contract debts is in no small measure his. The happy coöperation of the American delegation and Dr. Drago assures the peace of the world. The influence of Dr. Drago was largely personal, for although he spoke as a delegate of Argentine, it was not Argentinian influence, but the personal influence based upon the character and ability of Dr. Drago which inspired the confidence of his Latin-American brethren and which assured him the respect of his fellow delegates at large.



In the same way, the influence of M. Ruy Barbosa was personal, for, although he represented a great and a growing country of the western world, which has in its past played a leading rôle, especially in matters of arbitration, and whose future is full of boundless possibilities, M. Barbosa's influence was not only that of a delegate of Brazil, but of a representative of Latin-America. He voiced their sentiments, and proclaiming the equality of the States under international law, the equality of right, not merely in theory but in its exercise, he made himself the mouthpiece against real or fancied aggression. He also made himself the spokesman of the various States that claim an equal influence as well as an equal vote in the regulation of international affairs. A man of great ability, of remarkable grasp of international law and a command of ready and idiomatic French, he was from the beginning a force, and in the concluding weeks of the Conference a dominating personality. I do not like to criticise a man whom I admire, and whose attitude I understand and appreciate, but it may not be improper to suggest that a too strict, not to say rigid, adherence to theory, and an unwillingness to adjust theory to the necessities of the modern world, which require often a renunciation of an extreme right in the interest of all, prejudice and discredit a theory; for

by the argument, a principle is pressed to an absurdity as a bubble is blown until it bursts. Looking at the words merely, there is some foundation for the argument, and, following the words, only, the conclusion may be arrived at.<sup>1</sup>

What shall one say of M. Renault without seeming to indulge in exaggeration? Trained in municipal law, a master of the conflict of laws, a teacher of public international law and the founder of the modern school of French jurisprudence, practiced in affairs of state, and representative of France at the most recent and most important international conferences, Professor Louis Renault was indicated in advance to play a leading rôle at the Second Peace Conference. His dele-

<sup>1</sup> White v. Bluett, 23 Law Journal, N. S., Exchequer, 36.



gation was a great and commanding one, his native language was the language of the Conference, and who more fitted than he to advance, expound, and defend the special interests of his Government in the language of the Conference? From the beginning he stood forth as the embodiment of the French delegation, but little by little his gentleness of manner, his large sympathy and breadth of view, his kindness, his mastery of international law and international procedure, his evident desire to subordinate self to the success of a great cause, the fairness which weighed the argument of friend or opponent with equal scales, caused him to be looked upon as one set apart. The skill in debate, for his answer to Baron von Bieberstein's masterly argument against arbitration was the great address of the Conference; the devotion to detail, evidenced by the numerous reports he presented to the Conference, his willingness to assume burdens under which the Conference itself staggered, his infinite tact and courtesy in reconciling divergent views and from discord producing harmony, caused him little by little to be looked upon, not as a member of the French delegation, but as a trusted adviser, counselor and guide of the entire Conference. He came to the Conference a Frenchman; he left it a citizen of the world, and in the last weeks of the Conference the simple teacher of youth became the leader of men of affairs. It is no discourtesy to other delegations, nor is it any injustice to any one man or group of men, to say that Louis Renault was the man of men, the incarnation of the spirit and purpose of the Conference, and that his work in commission, in committee, and especially as chairman of the small editing committee, has inseparably linked his name with the Second Peace Conference, and in his own day assured him the grateful remembrance of posterity. The meek and humble are not without their reward, but it rarely comes in such full measure in a lifetime.

In an interesting and hitherto unpublished address on the Second Hague Conference, the Honorable John W. Foster, who represented China, says:

The first three delegates from the United States, it is noted, were given the rank of ambassador, while in the delegations of the other leading powers only the first delegate was named an ambassador. It was supposed that this rank would give our delegates greater prominence and usefulness, but it proved a pure fiction, and our Government might well have avoided as a democracy setting an example to the monarchies of the world of the cultivation of rank and personal distinction among delegates, who should be in name, as they were in fact, on an equality. The only effect of their high rank was to cause some inconvenience to the host in the seating at dinner parties.

Thirty out of the forty-four nations at the Conference sent no delegates of ambassadorial rank, and all were upon the same footing in respect to their rights in the sessions.

The first delegate was chairman of his delegation, and expressed authoritatively the attitude of his Government whether he was an ambassador, as in the case of Marschall von Bieberstein, of Germany, a simple plenipotentiary, as in the case of Mr. Beldiman, of Roumania, or a charge d'affaires, as in the case of M. Gil Fortoul, of Venezuela. The division into plenipotentiaries and non-plenipotentiaries would seem to be adequate, and as the rank of ambassador failed to carry with it any additional privilege, it is difficult to understand the reason for its creation. If it be said that a former ambassador might feel ill at ease as a simple plenipotentiary, the conclusive answer is that Dr. Andrew D. White was not merely a former, but actual ambassador to Berlin at the time of his designation as plenipotentiary at The Hague, and it is also a fact that other ambassadors represented their countries as plenipotentiaries at The Hague without any evidence of inconvenience. But if it be desirable that the first delegate be an ambassador, there seems to be no reason why other members of the delegation should be ambassadors, and the division of plenipotentiaries within one and the same delegation, as in the American delegation at the Second Conference, does not seem advisable. And in this connection, it may be remarked that accrediting naval and military delegates as plenipotentiaries, whereas most of their associates were technical delegates, without full powers, does not seem to have given

them any greater influence with the Conference, or with their associates.

Alongside of the official delegates, there were present at both conferences private persons interested in the success of the Conference, and who at times contributed not a little to its success. From Dr. White's *Autobiography*,<sup>1</sup> I quote the following entry, concerning the First Conference:

The peace people of all nations, including our own, are here in great force. I have accepted an invitation from one of them to lunch with a party of like mind, including Baroness von Suttner, who has written a brilliant book, *Die Waffen Nieder*, of which the moral is that all nations shall immediately throw down their arms. Mr. Stead is also here, vigorous as usual, full of curious information, and abounding in suggestions.

At the Second Conference, the Baroness was a welcome and distinguished visitor, and Mr. William T. Stead was not only influential, but helpful, during the entire four months of the Second Conference. His interest in the peace movement and cause which he has championed for years has not diminished, and he placed himself wholly at the disposition of the delegations and delegates from the beginning to the end of the Conference. Simple citizen as he was, he was familiar with the work of the Conference in all its details, and enjoyed more personal influence with many of the delegates than did His Excellency the President.

The Second Conference, like the First, desired to conduct its proceedings in private, but decided to supply certain information to the public, in such form and in such quantities as not to interfere with the orderly course of its deliberations. But the Conference was very large, and it might well happen that delegates, even although they received three copies of each printed document might not be fully abreast of the proceedings. The various happenings at The Hague would be unknown to them. Mr. Stead established, published, and supplied at his own expense to the members of the Conference, a daily chronicle of its proceedings, entitled the *Courier de*

<sup>1</sup> Vol. II, p. 260.

la Conférence de la Paix. The 109 numbers of this journal dealt with all phases of the Conference, including the official and social life, contained accounts of the meetings, abstracts of reports, and at times the full text of important addresses. In addition, it conveyed a vast amount of interesting and related information concerning the history of doctrines presented to and discussed by the Conference, and in a lighter vein, gathered up and preserved the floating witticisms and reproduced the caricatures with which the press of Europe teemed. Pictures of the delegates and of the delegations, sketches of important personalities, found an appropriate place in the columns of the journal, and it is not too much to say that the *Courrier de la Conférence* gives the best daily picture of the Conference, its hopes, its fears, and its actual work, which is likely to appear. In no small sense of the word, Mr. Stead was a co-worker with the official delegates, and he may not be inaptly called a delegate at large.

### 3. FORMAL AND INFORMAL ADDRESSES AT THE CONFERENCE

It may be interesting to consider briefly the character of the addresses made at the Conference, in order that a clearer idea may be gained of the assembly, and of the manner in which projects were presented and justified,—indeed forced upon the attention of the delegates. The *Règlement* provided that projects should be presented to the Conference, printed, and distributed, before they were discussed, and this rule was adhered to. Amendments were indeed presented and accepted in the course of the sessions, but discussion did not take place upon original propositions until they had been printed and distributed to the members. The addresses therefore would naturally fall into two classes: first, formal and carefully prepared orations, in the nature of essays; and, second, unprepared and impromptu speeches delivered in the course of debate, either upon an original proposition, a proposed amendment, or a criticism of the subject under immediate discussion. The formal addresses were read from written copies, such as the



opening addresses of the Dutch Minister of Foreign Affairs, and the President of the Conference. The various chairmen usually read their addresses, although that was not the case with M. de Martens, who spoke freely and without notes. The remarkable addresses of Baron Marschall von Bieberstein, in which he rejected arbitration with reserves, but promised to consider *sans parti pris* the arbitration of carefully selected lists of subjects, and his later address opposing the carefully devised and acceptable project of certain specified subjects, were documents prepared with great care and read from manuscript. Mr. Choate's elaborate argument for the immunity from capture of unoffending private property of the enemy upon the high seas, was likewise read. The admirable address of General Porter upon the limitation of force in the collection of contract debts, was a set speech, although the first part of it was delivered without notes. Dr. Drago read his various addresses, and the same is true of M. Barbosa, although his unpremeditated reply to M. de Marten's criticism of a previous address as savoring of politics, was, in the opinion of many, not only M. Barbosa's masterpiece, but was a model of parliamentary debate. From the many set addresses delivered at the Conference, I take the liberty of quoting in full the address of M. Larreta, on the International Court of Prize, which is not only a model in itself, but expresses the attitude of a newcomer in an international conference. It was so frequently interrupted by applause, and was so thoroughly enjoyed by the Conference, that its selection as a type of the formal address can hardly be said to be a personal matter:

The Argentine Delegation will unreservedly vote for the project drawn up by the Committee of Examination, but we must first set forth the reasons for which we acquiesce.

We believe that the prize court will represent an important step forward for the double fact that it will superpose, so to speak, the awards of an impartial tribunal upon the more or less interested appreciations of the belligerents, and that in addition it will be the first international jurisdiction created by the civilized world. I will even add that in our opinion a court of this nature becomes at this time not only a desirable progress, but also an indispensable institution.



The Conference is engaged in establishing the legislation of maritime warfare after ascertaining and determining some points of contact, that is to say, the principles and interest which, in this respect, are common to all the civilized nations. I am well aware that we should not go very far yet on the path that has been opened to us. Just as we do not think of modifying in a fortnight our warlike civilization, we will not draw up the final code of maritime warfare in the course of this Conference. But the principles here established will none the less mean a marked advance over those of the Paris Congress which still prevail in the matter.

It is true that all legislation demands a court for its enforcement, if I may be permitted to condense in this phrase the eloquent speech of His Excellency Mr. Bourgeois on compulsory arbitration. On the other hand, the converse proposition is no less true. Every court must needs lean on precise legislation. This is why I venture to predict that when the prize court is once created all the Signatory States will take it to heart to concert for the purpose of completing maritime warfare legislation and supplying its deficiencies.

I have nothing more to say on this question, especially after the statement laid before the commission by its eminent reporter. But knowing that the great difficulty met by the Committee of Examination was in regard to the mode of organization of the tribunal, I wish to offer some declarations in this respect.

When the question was about the permanent court of arbitration my colleague, His Excellency M. Saens-Peña, declared that in his opinion the best basis of representation for each country was found in its aggregate foreign trade. We believe, indeed, that when one criterion is considered, there is none better for the appreciation of the comparative capacity of the States from an international standpoint. But we also know that this criterion is not any more essentially absolute than mathematically accurate. As a matter of fact, all statistics are inaccurate, as much on account of the imperfect methods used as by reason of the patriotic sentiment which induces the statisticians to increase the figures in favor of their country. It would thus be well in seeking to establish the representative coefficient of each nation to complete the data of foreign trade taken as a basis with those taken from population, military and naval power, length of seacoast and land boundary, not only of the country itself, but of the neighboring countries;—in fine with all the physical and moral factors which enhance or restrict the relative influence of nations.

For the present, and as an approximate solution, we shall consider it sufficient, according to the declarations made by His Excellency M. Lammasch, that in framing the present

project, the tonnage of merchant vessels, as well as the power of war vessels, shall have been taken into consideration, besides the amount of foreign trade. We accept the position assigned to the Argentine Republic in the apportionment of judges, not only because we believe in the good faith which determined it and which in fact is not far from the truth, but also because we have looked upon the project not so much as a problem in arithmetic as an institution of confidence and harmony. [Applause.]

The Argentine Republic may have been entitled to a higher rank. We now lead the whole world in the export of cereals. Our annual foreign trade represents over five hundred francs per capita, the highest figure known; and again our navy exceeds eighty thousand tons, which is a high figure for a State of the South American Continent. But, granting that some error may have crept into the appreciation of our relative importance, and that we may be entitled to a slightly longer representation than that assigned to us, this is a small sacrifice which we readily agree to in homage to this great endeavor of law and equity. [Applause.]

However, gentlemen, patriotism is still stronger than the love of peace, and I need not say that while examining the project, we never for an instant lost sight of the interests of our country. In my opinion, these interests find a complete safeguard in the Swedish proposition adopted by the Committee of Examination. Each belligerent will always have a judge. We consider this sufficient, for if we should be involved in war, if so great a calamity ever befall our country, we should then hold in the prize court the same status as the other belligerent; we should all be equal before law and equity. I mean enjoying the same equality which is inseparable from sovereignty.

And since I have uttered the word, permit me to add that while spontaneously accepting this convention we will put forth in the most striking manner the unrestricted sovereignty enjoyed by the Argentine Republic. This is what brought us here; to coöperate without humility but without pride in the endeavor of universal justice. Without humility, but without pride, for while we highly appreciate the honor of sitting in this assembly, we have in return, by being present, given it the splendor and the power of a world's meeting.<sup>1</sup> [Applause.]

Turning now to the less formal addresses, it may be said that Mr. Choate was peculiarly happy in his extemporaneous remarks, which, although delivered in English, were understood by a large part of the audience, and which, in translated form, were admired by all. His remarks on the

<sup>1</sup>La Deuxième Conférence Internationale de la Paix, 1907, vol. II, First Commission, 2d Session, September 10, 1907.

prize court resulted in the establishment of that institution, and although later reduced to writing, they were delivered without notes, in that happy, off-hand manner born of familiarity with the court. In ready and incisive speech in the nature of a parliamentary debate, no member shone with greater luster than M. Bourgeois, and Baron Marschall von Bieberstein, who, in a few trenchant phrases, laid bare the argument of his opponent, and subjected it to ridicule, if he did not wholly discredit it. In the latter days of the Conference, M. Renault displayed marvelous and unexpected readiness and aptitude in debate, and his replies to Baron Marschall von Bieberstein's arguments against arbitration are, perhaps, the best unpremeditated debating addresses of the Conference. The president, amid the applause of the Conference, stated that addresses would be limited to ten minutes, but this regulation was "more honored in the breach than the observance." Mr. Choate's argument in favor of the immunity of private property, occupied more than an hour in its delivery, and in this respect at least, M. Barbosa followed in the footsteps of Mr. Choate, for if no one address exceeded this limit, several of M. Barbosa's approached it. But these lengthy addresses were interspersed with shorter and sprightlier ones, and the element of humor was not absent. For example, Mr. Choate said, in replying to Marschall von Bieberstein's platonic devotion to arbitration:

I should like to say a few words in reply to the important discourse delivered by the First Delegate of Germany, with all the deference and regard to which he is justly entitled because of the mighty empire that he represents, as well as for his own great merits and his unfailing personal devotion to the consideration of the important subjects that have arisen before the Conference. But with all this deference, it seems to me that either there are, in this Conference, two First Delegates of Germany or, if it be only the one whom we have learned to recognize and honor, he speaks with two different voices. Baron Marschall is an ardent admirer of the abstract principle of arbitration and even of obligatory arbitration, and even of general arbitration between those whom he chooses to act with, but when it comes to putting this idea into concrete form and prac-

tical effect he appears as our most formidable adversary. He appears like one who worships a divine image in the sky, but when it touches the earth, it loses all charm for him. He sees as in a dream a celestial apparition which excites his ardent devotion, but when he wakes and finds her by his side he turns to the wall, and will have nothing to do with her.

General Porter's single sentence in reply to Lord Reay, of the British delegation—*Depuis la politique démodé de Marcy, le gouvernement des États-Unis a acquis de l'expérience et préfère aujourd'hui la politique plus moderne de Roosevelt*<sup>1</sup>—was as effective and more pointed than an elaborate reply.

A couple of incidents, taken respectively from the First and Second Conferences, as well as a single unofficial utterance, will show the humor both within and without the Conference, and suggests, if it does not prove, that sprightliness is not inconsistent with gravity and enterprises of great pith and moment. The first is taken from Mr. White's Autobiography.<sup>2</sup>

Count Zanini, the Italian minister and delegate here, gave me a comical account of two speeches in the session of the first section this morning; one being by a delegate from Persia, Mirza Riza Khan, who is minister at St. Petersburg. His Persian Excellency waxed eloquent over the noble qualities of the Emperor of Russia, and especially over his sincerity as shown by the fact that when his Excellency tumbled from his horse at a review, his Majesty sent twice to inquire after his health. The whole effect upon the Conference was to provoke roars of laughter.

The humor of the incident was enhanced by the fact that His Persian Excellency was utterly unconscious of the absurdity of the situation. The second incident is set forth by Mr. John W. Foster, who, as a member of the Chinese delegation,

<sup>1</sup> It is impossible adequately to translate General Porter's happy French, but a literal rendering of it is as follows: "Since the old fashioned policy of Marcy, the Government of the United States has gained experience and now prefers the more modern policy of Roosevelt."—*La Deuxième Conférence Internationale de la Paix, Actes et Documents, Vol III, Fourth Commission, 9th session, p. 875.*

<sup>2</sup> Vol. II, p. 321.



is most competent to pass upon the qualifications of his colleague.

The military delegate of China established a great reputation as a wit, notwithstanding he was one of the most serious-minded of the members and never consciously attempted a joke. While the subject of the formal proclamation of war was under consideration, he asked the Commission what should happen when one nation declared war against another if the latter did not wish to fight. At another session when the same subject was under discussion, he stated that he regarded it as important that the Conference should define accurately what constituted a state of war, for, said he, my country has had its navy destroyed, its ports bombarded, and its capital occupied by foreign troops, when the perpetrating nations declared their acts not war, but only *expeditions*, referring to the French hostilities of 1885 and the allied occupation of Peking in 1900. The only answer he received to his inquiries from the Commission was a hearty laugh from the delegates, who regarded them as sallies of wit or sarcasm on the part of the celestial member.

The last specimen is taken from Dr. White's Autobiography,<sup>1</sup> and narrates an experience with the First Conference which might be matched by others, only less interesting, from the Second. Under date of June 4, 1899, Mr. White says:

We have just had an experience which "adds to the gaiety of nations." Some days since, representatives of what is called "the Young Turkish party" appeared and asked to be heard. They received, generally, the cold shoulder, mainly because the internal condition of Turkey is not one of the things which the Conference was asked to discuss; but also because there is a suspicion that these "Young Turks" are enabled to live in luxury at Paris by blackmailing the Sultan, and that their zeal for reform becomes fervid whenever their funds run low, and cools whenever a remittance comes from the Bosphorus. But at last some of us decided to give them a hearing, informally; the main object being to get rid of them. At the time appointed, the delegation appeared in evening dress, and, having been ushered into the room, the spokesman began as follows, very impressively:

"Your Excellencies, ve are ze Young Turks."

This was too much for most of us, and I think that, during our whole stay at The Hague thus far, we have never undertaken anything more difficult, physically, than to keep our faces straight during the harangue which followed.

<sup>1</sup> Vol. II, p. 288.



## 4. THE SOCIAL SIDE OF THE CONFERENCE

Turning now to the delegates as individuals, rather than as members of the Conference, a matter that presented itself, and which was of great importance to some, was, how are these three hundred persons to get acquainted? That was a question which time would solve, for day by day, the delegates learned to know each other, and to lay the foundations for pleasant and life-long friendships. In his work on the First Conference, Mr. Holls states that

One of its pleasantest features was certainly the daily luncheon at the House in the Wood, sumptuously served, and affording an opportunity of daily intimate and unrestrained personal intercourse and acquaintance, the value of which can hardly be overestimated. The grouping of the various delegates at the luncheon tables changed from day to day, with the result that rarely if ever has a gathering of this size and character been attended with such complete personal acquaintance among all the members, even those whose duties and tastes were most diverse.<sup>1</sup>

The size of the Second Conference rendered it difficult to provide a daily entertainment of this kind, for, while it was possible to furnish quarters in which the delegates of twenty-six states could break bread together, it was difficult to find a room in which the representatives of forty-four states could seat themselves at table, and indulge in social intercourse. The Dutch Government was no less hospitable in 1907 than in 1899, but, in lieu of a dining-room, provided a free lunch counter, or buffet, in the second story of the Binnenhof, where light refreshments were served to the various delegates before and after the afternoon sessions. Simple as was the fare, the idea was excellent, for it gave the delegates a meeting place. Many a friendship was formed over a sandwich and cup of tea, and many an important proposition was discussed and settled in the smoking of a cigar.

But this natural way of meeting your fellow-delegate did not satisfy the requirements of diplomatic etiquette, for

<sup>1</sup> Holls' Peace Conference, p. 323.

delegates and their families must get acquainted in a more formal way. As it seemed impossible or inconvenient for the delegates to call in person upon each other, and lay the foundations of friendship by an actual exchange of visits, a method was devised which introduced the delegates without the embarrassment of a personal interview.

In an unpublished article on the Second Conference, Mr. John W. Foster, who is an authority on diplomacy, and well versed in its intricacies, says:

It was a perplexing question for the resident diplomatic body to determine how these gentlemen were to exchange their official calls or to become acquainted with each other. After grave deliberations it was decided that on the day before the meeting of the Conference each member of a delegation was to leave his card upon all the members of the other delegations, also upon all the Palace officials and the heads of the different departments of the Dutch government, including the wives. Hence on that day the streets of The Hague and of Scheveningen were full of automobiles and carriages, dashing about in hot haste in all directions, with the secretaries of the respective delegations leaving handsful of cards at every stopping place. After these perfunctory card visits each member of the Conference was supposed to have made the acquaintance of his colleagues. My secretaries reported that in that one afternoon they had deposited 1100 cards, and it was estimated that a total of 95,836 cards had been distributed by and to the delegates and officials.

The diplomatic proprieties having been complied with, the Dutch Government, as well as the individual delegates, prepared a series of official and unofficial receptions, more wearing and tiresome to many of the delegates than the labors of the Conference.

Of the official and unofficial entertainments to the members of the First Conference, Mr. Holls, a participant and survivor, wrote as follows:

On the evening of May 24, Their Majesties the Queen of the Netherlands and the Queen Mother gave a grand *soirée* in honor of the Conference at the Royal Palace at The Hague. Besides the members of the Conference, the Diplomatic Corps and the entire court society of The Hague had been invited, and the scene was one of great brilliancy. Before the general

reception the members of the Conference were individually presented to Their Majesties, who spoke to each of them most gracious words of welcome. On July 6, Their Majesties gave a state dinner in honor of the Conference at the Royal Palace in Amsterdam, the guests being conveyed to and from Amsterdam by special train. At this occasion the members were again presented to Their Majesties, who congratulated them upon the progress of their work, and after the dinner Queen Wilhelmina proposed the toast to the health of all the Sovereigns and heads of state represented at the Conference. In response Baron de Staal proposed the health of Their Majesties, which toast it is needless to say was received with great enthusiasm.

On May 27 the Burgomaster and Municipal Council of The Hague gave a grand concert to the Conference, in the Hall of Arts and Sciences, and on June 17 the Netherlands Government gave a musical and artistic festival, the climax of which was an historical dance illustrating the costumes of the various Dutch provinces. A great floral and equestrian fête and contest at Haarlem on June 4 was also given in honor of the Conference, and will remain a most beautiful recollection for all who were privileged to take part. The same is true of the grand concert and ball at Scheveningen, given by the Société des Bains de Mer de Schéveningue on June 12.

Besides these entertainments it is needless to add that official society at The Hague was profuse in its social attentions, and the same is true of the Diplomatic Corps, whose members vied with each other in making the stay of their visiting colleagues agreeable.<sup>1</sup>

Dr. Andrew D. White's Autobiography abounds with references to public and private receptions, and he concludes with the statement that Holland was "a princely host." There is no reason to believe that the Holland of 1907 differed in this respect from the Holland of 1899, for the most exalted as well as the lesser officials of the Dutch Government vied with each other in their desire and effort to make the sojourn of the members of the delegation as pleasant as the work of the Conference was sure to be memorable.

The Queen twice received the members of the Conference at the Royal Palace, passing from delegation to delegation with a pleasant word and smile for delegation and delegate,

<sup>1</sup> Holls' Peace Conference, pp. 323-325.

and Her Majesty likewise entertained the first delegates at dinner at the Royal Palace at Amsterdam, at which time and place she graciously distributed to the first delegates refined and beautifully engraved silver medals, struck in honor of the Second Conference. Her Majesty later, through the Ministry of Foreign Affairs, presented medals of the same design, differing only in inscription, to the various plenipotentiaries and technical delegates.

The birthdays of the Queen and the Queen's mother occurred during the sessions of the Conference, and the Capital City of The Hague was beautifully decorated and illuminated in honor of each occasion.

The Dutch Government entertained the delegates by an outing at Rotterdam and its charming surroundings. The Council of The Hague gave a ball at Scheveningen, at which the country dances of Holland were exquisitely executed.

Private hospitality was munificent, whether it was official or of a semi-official character, and the various delegations represented at The Hague vied with each other in lavish entertainment of their colleagues. The American delegation gave four entertainments at Scheveningen. The first delegates were dined with constant and embarrassing regularity, so that many evenings of the week were given over to social intercourse, and indeed all members of the delegation, irrespective of rank, were recipients of invitations which brought them into close and unofficial contact with their fellow-members. One of the most delightful episodes of the Conference was the invitation extended by Belgium to the delegates, and accepted by them, to visit Bruges and witness an elaborate and artistic representation of the *toison d'or*. Indeed, it is not too much to say that the delegates at The Hague were almost killed with kindness.

Not only were the delegates fêted, but their wives and the members of their families visiting The Hague were the recipients of official and private hospitality. The European delegations were not, as a rule, accompanied by their families, but, little by little, surreptitiously, as it were, they were



smuggled into The Hague, and graced the official dinners offered by the various delegations. America—North, Central and South—showed that the body politic is based upon the family tie, and the American delegates were often accompanied, not merely by their wives and children, but, in some instances, by their grandchildren. The ladies added not merely to the social charm, but, by their vivacity, enlivened the proceedings, and by richness of color of their elaborate and fashionable costumes relieved the somber of the evening broadcloth. They took part in all the excursions, and their presence in the gallery at the plenary sessions of the Conference, and at the closing session on the floor of the House, broke the gravity and reserve ordinarily present in the deliberations of their grave and reverend signors. However much Pan-America may have perplexed, embarrassed, and at times, astonished the Conference, no criticism was heard of the visiting ladies, and it is safe to prophesy that the Third Conference will see the European delegates surrounded by their families; for, if a European navigator discovered America, the American woman has conquered Europe.

As the Second Conference met on the fifteenth of June, and adjourned on the eighteenth of October, and as the First Conference spent the greater part of the month of July at The Hague, the American delegation celebrated at each conference the Fourth of July. It need not be stated that the national holiday was enthusiastically observed, but, although the reception given in 1907 in the Hôtel des Indes by Dr. and Mrs. Hill was highly enjoyable and successful, and presented the rare spectacle of the nations of the earth meeting for one brief moment to do homage to the young Republic, still, it must be said, that the celebration of 1899 had a propriety and dignity which any purely social gathering must needs lack; for the Conference of 1899 was not, as has been shown, an unexpected and happy inspiration, although it was in a certain sense of the word unprecedented. The Hague was well chosen for its place of meeting, for in that city Grotius lived and achieved distinction before faction and fanaticism drove him an exile



from his home and country, graced, as he says, by so many of his labors. In the little town of Delft, almost within sight of The Hague, he first saw the light of day, and as the Conference itself was the natural outcome of his life and labors, and as our beloved country has drawn not merely some of its institutions, but its very name—The United States—from Holland, it seemed peculiarly appropriate that the American delegation, in celebrating the Fourth of July, should recall with gratitude the founder of international law, and the instigator, if not the initiator, of the Conference. Therefore, on June 6, 1899, Dr. White wrote a private letter to the Secretary of State, suggesting

that our American delegation be authorized to lay a wreath of silver and gold upon the tomb of Grotius at Delft, not only as a tribute to the man who set in motion the ideas which, nearly three hundred years later, have led to the assembling of this Conference, but as an indication of our gratitude to the Netherlands Government for its hospitality and the admirable provision it has made for our work here, and also as a sign of goodwill toward the older governments of the world on the occasion of their first meeting with delegates from the new world, in a conference treating of matters most important to all nations.<sup>1</sup>

The appeal to the Secretary of State was not in vain, for, as is well known, the late John Hay was not merely a man of affairs, but no mean craftsman in literature, and responsive to literary suggestion and tradition. The American delegation was, therefore, authorized to carry out its intention. The wreath as authorized and prepared, as Dr. White says in his Autobiography,

is very large, being made up, on one side, of a laurel branch with leaves of frosted silver and berries of gold, and, on the other, of an oak branch with silver leaves and gold acorns, both boughs being tied together at the bottom by a large knot of ribbon in silver gilded, bearing the arms of the Netherlands and the United States on enameled shields, and an inscription as follows:

<sup>1</sup> Andrew D. White's Autobiography, Vol. p. 291.

To the Memory of Hugo Grotius;  
In Reverence and Gratitude,  
From the United States of America;  
On the Occasion of the International Peace Conference of  
The Hague.  
July 4th, 1899.

It is a superb piece of work, and its ebony case, with silver clasps, and bearing a silver shield with suitable inscription, is also perfect: the whole thing attracts most favorable attention.<sup>1</sup>

The entry of July Fourth gives in briefest form the account of the celebration:

On this day the American delegation invited their colleagues to celebrate our national anniversary at the tomb of Grotius, first in the great church, and afterward in the town hall of Delft. Speeches were made by the minister of foreign affairs of the Netherlands, De Beaufort; by their first delegate, Van Karnebeek; by Mr. Asser, one of their leading jurists; by the burgomaster of Delft; and by Baron de Bildt, chairman of the Swedish delegation and minister at Rome, who read a telegram from the King of Sweden referring to Grotius's relations to the Swedish diplomatic service; as well as by President Low of Columbia University and myself: the duty being intrusted to me of laying the wreath upon Grotius's tomb and making the address with reference to it. As all the addresses are to be printed, I shall give no more attention to them here. A very large audience was present, embracing the ambassadors and principal members of the Conference, the Netherlands ministers of state, professors from the various universities of the Netherlands, and a large body of other invited guests.

The music of the chimes, of the organ, and of the royal choir of one hundred voices was very fine; and, although the day was stormy, with a high wind and driving rain, everything went off well.

After the exercises in the church, our delegation gave a breakfast, which was very satisfactory. About three hundred and fifty persons sat down to the tables at the town hall, and one hundred other guests, including the musicians, at the leading restaurant in the place. In the afternoon the Americans gath-

<sup>1</sup> Ibid., Vol. II, p. 326.

ered at the reception given by our minister, Mr. Newell and his wife, and in the evening there was a large attendance at an "American concert" given by the orchestra at the great hall in Scheveningen.<sup>1</sup>

It is a matter of regret that the American delegation of 1907 did not follow the admirable precedent set by the delegation of 1899, and in an appropriate manner, on the Fourth of July, 1907, commemorate John Robinson and the devoted band of pilgrims, who, fleeing from persecution, found a refuge in Leyden, and, unwilling to expose their children to the trials and tribulations of warfare, set sail on the 22d day of July, 1620, in the *Speedwell* from the little town of Delft Haven, to establish in an unknown world and under novel conditions, those principles of liberty and of righteousness in which America was conceived, and which, if it be not recreant to the principles of the founders, will strengthen and preserve us a nation and a power for good, not only in our own land, but in the remotest corners of the earth.

<sup>1</sup> Andrew D. White's *Autobiography*, Vol. II, pp. 327, 328.

## CHAPTER V

### THE NATURE, ORIGIN AND PRACTICE OF INTERNATIONAL ARBITRATION

#### 1. NATURE AND ORIGIN OF ARBITRATION

Before undertaking to consider and discuss in detail the subject of arbitration at The Hague Conferences, it may be well to premise some observations upon the nature and theory of arbitration in private law, and to illustrate by example the process by which arbitration has made its appearance in public law as the favorite method of settling international conflicts which diplomacy has been unable to adjust.

The fundamental distinction between the various forms of negotiation, whether it be conducted through the ordinary channels of diplomacy or by the offer of good offices or mediation, and arbitration is that negotiation suggests compromise and involves the wholesome principle of give and take, whereas arbitration properly and strictly considered is a judicial, not a diplomatic proceeding, although it may be preceded and followed by diplomacy in its various forms.

The fundamental distinction between arbitration and a judicial proceeding strictly so-called is that the resort to the former is voluntary, whereas the resort to the latter may be compulsory; that the private parties decide not merely whether they will arbitrate a difficulty, but they also determine the nature and extent of the submission and select the person or persons to whom the decision of the difference is submitted. The award may or may not be in strict accord with law but it determines the controversy, because the parties in their submission have agreed to accept the award as final under the supposition that the arbitrator has been honest even although he may have been mistaken in his judgment.

A court, on the other hand, is the instrument of the state, not the creation of the parties litigant, and its decision binds the parties not because they have agreed to be bound, but because the state imposes its will upon the parties. It is unnecessary to add that the judge is an officer of the state and is not, as is the arbitrator, the free choice of the parties to the controversy. It is equally elemental that the judge is bound by his oath to administer the law of the land, whereas the arbitrator is free to decide the controversy according to the terms of the submission, the equity of the case or the dictates of his own conscience. The distinction between the award of an arbitrator and the judgment of a court is thus sufficiently clear—a distinction, which has existed from the days of Aristotle who stated that “the arbiter looks to what is fair, the judge to what is law.”

In Greek private law arbitration was no stranger, and whereas the judge was required to interpret the law strictly the arbitrator might decide a case freely upon its merits, and whereas the judge was appointed by law, the arbitrator was selected by the agreement of the parties. And finally, whereas an appeal lay from the law court, there was no appeal from an arbitral award because by custom or agreement the parties accepted in advance the finding of the arbitrator as conclusive of the controversy. The submission to arbitration, the *compromis* of international law, was generally a written agreement to which was annexed an undertaking by third parties as sureties for the performance of the agreement in all its parts.

The system of arbitration, however, with which the modern world is familiar, is Roman, not Greek, although it may well be that the system of arbitration originally obtaining in Rome was modified or influenced by Greek thought. At Rome, as in Greece, the essence of arbitration is the voluntary nature of the proceeding, consisting in the agreement of the parties to arbitrate, in the terms of submission and the selection of the arbitrator to whom is intrusted the decision of the case. In the first place the parties reach an agreement (*compromissum*) and bind themselves under penalty to abide by the award



whether it be to perform some act or to pay a sum of money, whereupon the arbiter formally accepts the duty imposed upon him by the agreement of the parties (*receptum arbitri*). A failure to accept or execute the award is a breach of the contract of the parties and gives rise to an action which may be enforced by the court, which, however, does not revise the award but decrees its execution unless vitiated by fraud or corruption.

Roman arbitration appears in two forms, first as a legal proceeding, recognized and prescribed by the state in specified causes of action in which the arbiter is freer than the judge to do justice between the parties by invoking the spirit rather than in following the letter of the law. In other words, the judge administers the law, the arbiter does equity. In the second form, arbitration, although recognized by the law is not prescribed by it, and depends solely upon the parties to the controversy whether they shall settle their difficulty by a voluntary proceeding or whether they shall resort to the law courts. The arbiter in this case not only administers equity; he reaches a decision according to the judgment of a good and conscientious person. It is this latter form of arbitration which has maintained itself in our modern legal systems and which has furnished the basis for international arbitration.

The judge of Rome was the arbiter of the private citizen, and the voluntary reference to arbitration is the direct ancestor of the system of actions. It is beyond "the shadow of a doubt," says Dr. Moyle,<sup>1</sup> "that the whole Roman system of actions tried before a judge or judges took its origin from the custom to refer disputes to arbitration."

The earliest judges derived their judicial authority, such as it was, not from the state, but from the voluntary submission of the parties; and Sir H. Maine has shown (*Ancient Law*, pp. 375, et seq.), by an examination of the earliest Roman civil process, that the magistrate, even when commissioned by the state for the administration of justice, preserved the memory of the actual historical source of his functions by "carefully simulating

<sup>1</sup> Moyle: *Imperatoris Iustiniani Institutiones* (3d ed.), Vol. I, p. 635.

the demeanor of a private arbitrator casually called in." The later Roman jurists, though struck by the similarity in procedure between an ordinary action and a reference to arbitration, were guilty of the curious anachronism of deriving the latter from the former;<sup>1</sup> but the fact is that action grew out of arbitration, and the judge was originally only an unofficial referee; a fact of which traces are observable throughout the legal history of Rome. Thus, no action could validly be commenced, still less carried through to judgment, until the court had got both parties before it: for arbitration can take place only by consent, not by a unilateral act of either of them without the other. Still more forcibly are we reminded of the mode in which the early judge acquired his jurisdiction by the vitality of the rule that no judge could be forced upon a party of whose knowledge and integrity he was not satisfied.<sup>2</sup> Hence too the limited authority, as we should deem it, of the Roman *iudex*; he has no "imperium;" he cannot compel the parties to any act or forbearance; he is merely a referee whom they have chosen, and in whose appointment the magistrate has coöperated; all he has to do is to decide the questions submitted to him, so far as the parties may enable him; he has to leave to them the realization (by execution) of the right he ascertains. The very point he has actually to settle is at first kept studiously in the background, and hidden behind a wager; the decision is not an order or injunction, but an expression of opinion, *sententia*, *pronuntiatio*.

In England we know from actual records with what rapidity trial by jury in civil causes, though in most cases optional only, superseded the more barbarous methods of compurgation, ordeal, and trial by battle, and that this was largely due to a sense of the greater justice and reasonableness of the new system. We can hardly doubt that upon much the same grounds the practice of arbitration daily gained greater favour among the Romans. When political authority has at length obtained a firm footing, the magistrate is gradually preferred by litigants to a citizen arbitrator, perhaps from a conviction of his greater wisdom and impartiality; if he is a king, perhaps too because his divine descent is believed to confer upon him a sense of right, and a kind of knowledge, above his merely human fellows. Finally, the judicial function is recognized as appertaining to the state; though the primitive remedies may to some extent survive in all their rudeness, and though the state administration of justice may still more widely bear traces of the social condition which preceded political organization, still the natural mode of

<sup>1</sup> "Compromissum ad similitudinem iudiciorum redigitur."

<sup>2</sup> "Neminem," says Cicero, "voluerunt maiores nostri non modo de estimatione cuiusquam, sed ne pecuniaria quidem de re minima esse iudicem, nisi qui inter adversarios convenisset." Pro Cluentio, cap. 43.

deciding a dispute is to go to the magistrate, and rules of civil procedure have begun to assume consistency. Courts have become established; their mode of action is prescribed by law; any attempt to evade their authority by recurring to other methods of obtaining satisfaction, save in certain well defined cases, is considered a defiance of law, and a breach of the peace.<sup>1</sup>

There are thus three stages in the development of the Roman judicial system: (1) the private litigant submitted his controversy to an arbiter of his own choice for decision according to the conscience of a good and impartial man; (2) the magistrate or judge is chosen from an official list or panel is preferred to a citizen arbitrator; (3) the administration of justice is regarded as the duty and therefore the right of the state, and a judicial system is prepared for and imposed upon the citizen.

Is not the same unconscious development seen in the growth of arbitration between states? As independent beings they chose arbiters, the pope in times past, a foreign sovereign in modern times; the consciousness of the defects of this system in which the individual case is decided, but continuity of decision is wholly lacking, has led to the second stage, which dates from the first Conference, namely, the appointment by international action of a panel of judges from which the judges forming the temporary tribunal are chosen. We stand upon the very threshold of the third and final development when the nations as a whole determine that international justice is the province of the international community and constitute a court of international justice to which litigant states may resort in conflicts of importance. The

<sup>1</sup> Moyle, *loc. cit.*, 635, 636.

That arbitration was a means to stay self-help; that self-help was permitted if arbitration was refused or the award was uncomplished with; that the judicial system of Rome was developed from the private contract of the parties to arbitrate (*compromissum*), see Jhering's *Geist des Römischen Rechts*, Vol. I, pp. 107, et seq., more especially pp. 168-176. On the subject of arbitration in Roman law, see generally: Matthiass' *Entwicklung des römischen Schiedsgerichts* (1888); Roby's *Roman Private Law*, Vol. II, pp. 320-322.

For a brief account of the development of the Roman judiciary from private arbitration, see Macy's *Outlines of Roman Law*, 1884, pp. 14-19.

foundations of this international tribunal are already laid; its organization, its jurisdiction, its procedure have been determined, and we only await the appointment of judges in order to establish the court of arbitral justice in which the nations of the world may obtain justice as easily and readily as private suitors in national courts of justice.

Such, in brief, seems to be the system of arbitration understood and practiced in Greece and Rome. In England, notwithstanding the jealousy of the common law, and contempt for the civil law in all its forms, arbitration was transplanted bodily from Rome, and flourishes not only in England but wherever the English language is spoken.<sup>1</sup> Arbitration is likewise recognized in the modern civil law, and the precedents of Greece and the Middle Ages show how admirably fitted arbitration was and is for the solution of controversies between nations neither having nor recognizing a common superior, and how easily and unconsciously the arbitration of private law became an institute of public law.

In ancient times, when war constituted the normal state of peoples and the foreigner was everywhere treated as an enemy, arbitrations were necessarily rare, and we do not find either a general system or harmonious rules governing the subject. There were a few cases of arbitration in the East and in Greece, but the mode of procedure was not suited to the temperament of the people, and, after the peace of Rome was established, with the civilized world under one government, there was no place for it, since arbitration presupposes a conflict between independent states.

In the Middle Ages, owing to the peaceful influence of the church, arbitrations were more frequent, and yet their influence was far from producing all the results which might have been expected, perhaps because Europe was then divided into a

<sup>1</sup> An early and much esteemed book, the *Symboleography* of one William West, appeared in the very century of the English Reformation, and its second part deals fully and quaintly with arbitration. In order to show the identity between private and international arbitration, both in substance and form, I quote in the Appendix, pp. 772-776 a few sections from West, dealing with the *compromis*, the arbitrator and the award.

I owe this reference to *The Arbiter in Council* (1906), to which excellent book the reader is referred.



great number of petty states, or because the rude manners of the period were intolerant of the idea of conciliation.

Later history does not present many cases of arbitration, for the ambition of princes does not, any more than did that of the Roman people, adapt itself to pacific remedies in conflicts in which they hoped to gain an advantage by force of arms. Absolute monarchy is essentially warlike; it rarely turns aside from the objects which it pursues, although it has not, as Rome did, either forced its yoke on all nations, or fallen under the combined assaults of those whom it has sought to subjugate.<sup>1</sup>

With this statement, quoted from a work of great merit, the subject of arbitration before the Jay Treaty of 1794 might be dismissed, because it is only from this date and the impetus given to arbitration as a means of settling international disputes that arbitration may be said to have made its appearance as a systematic means of settling conflicts. The past is, however, important because it furnishes precedents for arbitration, and in so far justifies the theorist by enabling him to point to the arbitration of concrete cases. We can easily discredit a theory as Utopian and impracticable as long as it remains in the realm of theory; it is impossible to deny a precedent and its conclusion, and it is difficult to maintain that what has actually been done and succeeded in the past may not succeed in the present and future. It is for the opponent to explain away the precedent and show its inapplicability to present conditions. The burden of proof is shifted; the opponent is put on the defensive, and unwillingness to resort to arbitration is a confession of weakness and defeat.

## 2. ARBITRATION IN THE ANCIENT WORLD<sup>2</sup>

I shall therefore set forth briefly some instances of arbitration in ancient times, the Middle Ages, and modern history, and show by concrete example that not only the agreement

<sup>1</sup> Mérygnhac: *Traité Théorique et Pratique de l'Arbitrage International*, (1895), translated in Moore's *International Arbitration*, Vol. V, pp. 4821, et seq.

<sup>2</sup>The instances of arbitration referred to in this section are taken from Mérygnhac, as translated in Moore, Vol. V, pp. 4821, et seq.



to arbitrate (*clause compromissoire*) but that arbitral procedure have been familiar in all time to the students of classical history and literature. We need not consider isolated cases of arbitration to be found among Asiatic peoples, not only because the instances are in themselves unimportant but because the institutions of the East were based upon inequality and subjection. Herodotus relates two instances of arbitration in his account of the Persians, but they are not of a nature to serve as precedents. For example, in a contest arising between Artabazanes and Xerxes, Darius decided in favor of the latter. The judgment, however, was not definitive and the people being divided in their opinion, the matter was submitted to the decision of the uncle of the two pretenders, who decided in favor of Xerxes. It will be noted that this case, if it be considered as an arbitration, was confined to Persia, and that in the next place, it was merely a family dispute settled within the family. The other instance related by Herodotus more nearly meets the requirements of arbitration, for he relates that after the defeat of the Ionians, Artaphernes, Satrap of Sardis, sent for the deputies of the cities and imposed upon them an obligation or a treaty binding them to settle future conflict by law rather than by force. It will be observed, however, that the relation is that of superior to inferior, that the element of volition is wholly absent and that while law is preferred to force the element of consent is wholly absent.

The various examples of arbitration to be found in Greek history, while differing from the Persian instances, have a point in common, namely, that the arbitration is national, or racial, rather than international; for the Greeks neither agreed to arbitrate nor did they actually arbitrate their differences with foreign countries. The foreigner was a barbarian and the contempt with which the foreigner was treated made foreigner and barbarian synonymous terms. The Greek was a superior, and the foreigner inferior, merely because he was a foreigner. Equality was entirely lacking and the element of confidence so essential to the success of arbitration was wanting. The classical examples of arbitration are inter-Grecian rather than inter-

national; for the Greeks considered themselves as members of one and the same family, differing, it may be in importance and in worldly station, but nevertheless possessing a common origin and a common ideal. They could therefore submit international disputes to other members of the family, whereas they would have scorned to permit the stranger a voice in the settlement. Members of one and the same family, they met as equals, and to preserve this equality, it was essential that each city should maintain its independence, and, in last resort, the sword rather than law was deemed essential.<sup>1</sup> Great political questions were therefore excluded and disputes submitted to arbitration chiefly concerned matters of religion, commerce, boundaries, the possession of contested territory, especially of the numerous islands in the Grecian seas. The following paragraph<sup>2</sup> from Méryghnac instances arbitration under these various headings:

In the time of Solon, five Spartans were chosen to decide between the Athenians and the Megarians, on the subject of the possession of the Island of Salamis. About the year 416 B. C., Argive judges acted as arbitrators as to certain islands of which the Cimolians and the Melians disputed the ownership. The Etolians rendered an arbitral sentence on a question of boundary between the cities of Melite and Pera, in Thessaly. Themistocles determined a dispute between the Corinthians and the Corcyraëans about Leucas, deciding that the peninsula should be held in common upon the payment of twenty talents by the Corinthians. During the reign of Antigone the inhabitants of Lebedos, having been forced to leave their country, settled in Teos; and certain questions which arose between the old and the

<sup>1</sup> On peut donner des exemples encore plus nets de ce culte pour la force. Dans une conférence, un Mégarien élevait la voix: "Mon ami, interrompt Lysandre, tes paroles auraient besoin d'une ville!" Autre déclaration de principes du même Lysandre, lors d'une discussion de frontières, les Argiens osent soutenir que leurs raisons sont les meilleures: "Celui qui est le plus fort avec cet argument-là, répond notre homme en montrant son épée raisonne mieux que tous les autres sur les limites des territoires."—Revon's *L'Arbitrage International: son passé son Présent, son Avenir* (1892) p. 92.

<sup>2</sup> Méryghnac: *Traité Théorique et Pratique de l'Arbitrage International*, as translated by Moore, in *International Arbitrations*, Vol. V, p. 4822.

new people of the latter city were adjusted by the city of Mitylene, appointed as arbitrator by the King Antigone.<sup>1</sup>

Parties may bind themselves to arbitrate disputes already in existence or they may agree to submit past or future controversies to arbitration.<sup>2</sup> The agreement to arbitrate is technically known as the *clause compromissoire*, the actual submission of the case is embraced in the *compromis*. By the agreement to arbitrate the parties are bound to submit the case when it arises. The *compromis* gives effect to the agreement, defines the issues to be arbitrated, and determines the procedure. The instances taken from Greek history are not merely important as showing the application of arbitration to a variety of subjects, but as proof that the Greeks understood the function of the arbitral clause and developed and employed the system of procedure with which we are familiar in the arbitrations of the present day.

For example, in a treaty of peace, friendship and alliance for fifty years concluded 418 B.C. between Argos and Lacedæmonia, it was provided that if a

dispute arises between some of the cities of the Peloponnesus or outside of it, whether it be a question of frontiers or some other subject an arbitration shall be had. If, among the allied cities, there are some who cannot get along together, the dispute shall be taken before a third neutral city, chosen for the purpose by common agreement.

It would be difficult to find a more perfect, that is to say, unlim-

<sup>1</sup>Ici nous avons une affaire coloniale et de plus, une condamnation pécuniaire comme dans l'arbitrage de Genève après l'affaire de l'Alabama. — Valmigrè, De L'Arbitrage International, 1898, pp. 62-63.

<sup>2</sup> Arbitration in all its forms derives its origin from the free consent of the Powers in dispute, and the only difference between the so-called compulsory arbitration and optional arbitration consists in the circumstance that the consent is given in advance in the former case while in the latter it is given after the dispute arises. In either case it is only a question of a sovereign act on the part of the Powers at variance, which by no means affects the independence of these Powers any more than a contract concluded affects the independence of the contracting party.—Sir Edward Fry, La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, First Commission, Fifth Session.

ited submission to arbitration. There is no reservation of any kind, and territorial questions which have been so fruitful of international disputes and have been the fertile causes of war in the new world as well as in the old are to be submitted to the judgment of an indifferent arbitrator for settlement.

Another example may be cited, which refers not merely to future disputes but to controversies already existing. The cities of Hyerapytna and Priansus stipulated that

in regard to the injuries already done on either side, Enipan and Neon, the cosmes or chief magistrates of Crete, should settle the disputes arising from these causes before a tribunal selected from each city. In regard to any future injuries they should commit they should employ lawyers prescribed in the order of the public edict.<sup>1</sup>

The cosmes were also to indicate the city from which both parties should choose the arbitrators.

Passing now to procedure. It appears, to quote from Mé-  
rignhac, that

The agreement designated the arbitrator and the subject of the litigation; the arbitrator named the time and the place of the decision, and the parties sent commissioners to defend their cause. The arbitrator, who was bound in the most solemn manner scrupulously to discharge his trust, conducted the business with religious care, heard the interested parties, and received their proofs. The sentence, drawn up in duplicate, was usually deposited in the temples or other public places, and both sides bound themselves by oaths to execute it.<sup>2</sup>

It is thus seen that the Greeks were familiar with arbitration, that they frequently employed it in concrete cases as they arose and bound themselves to resort to it for the settlement of future controversies, and that they so skillfully adapted private arbitration to public affairs that the procedure devised by them is acceptable and satisfactory at the present day. Arbitration was a distinctive trait of the Greek race and was viewed with favor both by historian and statesman. Thucydides declared that "it is impossible to attack as a transgressor

<sup>1</sup> Moore's *International Arbitrations*, Vol. V, p. 4823.

<sup>2</sup> Mé-  
rignhac: *Traité Théorique et Pratique de l'Arbitrage International*, as translated in Moore's *International Arbitrations*, Vol. V, p. 4823.



him who offers to lay his grievance before a tribunal of arbitration;" Aristides praised Pericles because to avoid war he is willing to accept arbitrators, and Aeschines, in his oration against Ctesiphon, commended Philip of Macedon because he was ready to refer his controversies with the Athenians to any impartial state.

If arbitration was practically unknown in Asia, and if it was only resorted to by the Greeks for the settlement of controversies of secondary importance, it is not to be expected that it was approved in theory or applied in practice by ancient Rome; for the great Republic not only looked upon the foreigner as an inferior but dreamed of the day when he might be subject to its power. Treaties of peace, of friendship and of alliance were indeed made with foreign peoples, but in the hope of ultimate subjection.

Considered as inferiors, Rome neither could nor would submit to their decision, and when the Rhodians proposed mediation to keep Perseus on the throne, the Senate received the proposition with sovereign contempt, and Titus Livius says that even in his time the recollection of the incident excited indignation. The conception of independence was necessarily repugnant to a nation aspiring to universal domination, and the only equality recognized was the equality of the inferiors among themselves. In such conditions arbitration was impossible, and the only remedy open to the inferior was petition for the redress of grievances. To quote again rather than to paraphrase Mériqnhae:

The Senate at first, the Emperor finally, as absolute arbitrators of all claims, gave audience to all deputies of peoples who had petitions to present, and who came as suppliants to ask for justice, for example, against the exactions of the governors of provinces. They were also the natural judges of conflicts which might arise between the different peoples subject to Roman authority. And the custom of taking the Senate as arbitrator was even introduced among independent nations, who were fascinated by the splendor of the Roman name. But it does not seem that the Romans played the rôle of arbitrator in very good faith, and their behavior might serve as a precedent for La



Fontaine's fable, *The Oyster and the Advocates*. In one case the Romans were arbitrators of some question of boundary between the Aricans and the people of Ardea, and they decided the point at issue by seizing the disputed territory themselves. There was a similar case about 180 B. C. between Nola and Naples. Cicero justly condemns this course, which he styles miserable trickery.<sup>1</sup>

As an institute of public law, arbitration was scorned by the Romans as inconsistent with an ambition in which justice played no part. It should be said, however, that in private law arbitration was highly regarded, developed and refined so that the rules and regulations framed by Roman jurists and applied in private litigation form a safe and sure guide for the settlement of controversies between independent states of the present day.

### 3. ARBITRATION FROM THE MIDDLE AGES TO JAY'S TREATY (1794)

Although examples of arbitration are not wanting, indeed they are frequent in the middle ages, conditions essential to systematic arbitration did not exist. The spiritual headship of the Church undoubtedly made for peace and the peaceful settlement of controversies, for the voice that bade Peter put up his sword was the voice of peace. But the supremacy of the Church was rudely shaken by the Reformation. Admitting, however, the spiritual supremacy of the Church, its claim to temporal sovereignty brought the Church face to face with the Empire which claimed and asserted temporal overlordship. The unseemly contest of centuries between Church and Empire in which the sword was freely drawn and used was not an edifying spectacle, and the example of Pope and Emperor influenced a world not over-inclined to peace and the ways of peace. The independence and consequent equality of states found no place in the theory or practice of the Middle

<sup>1</sup> Moore's *International Arbitrations*, Vol. V, pp. 4824-4825.

Ages, and foreign intercourse was based upon arrogance rather than upon the desire of justice. The supremacy of the Church or Empire was equally inconsistent with independence and equality, and arbitration based upon independence and equality and a desire for justice could not flourish in an atmosphere of lawless and unrecognized superiority.

The rôle of the Church in arbitration is more marked in the period of its decline than in the height of its power and influence, and the Empire, hostile alike to the independence and equality of the States, was rarely chosen as arbiter and could not impose arbitration upon those who disputed its title to supremacy.

The confusion, not to say anarchy, of internal conditions resulted in confusion and disorder which are inconsistent with the idea, much less the realization, of domestic peace based upon a respect for law and the order that springs from its observance. As aptly said by Professor Moore,

a slight familiarity with history suffices to show that the preservation of international peace is to a great extent dependent upon the preservation of domestic peace. Civil disturbances not only produce exceptional measures, which in turn give rise to complaints and claims, but they render uncertain the performance of international engagements and sometimes the readjustment of international relations.<sup>1</sup>

It is no slight tribute to the reasonableness and efficacy of arbitration that it maintained itself in the midst of a world of conflict and that it continued fitfully and hesitatingly the tradition of the ancient world. It is rather a source of comfort and consolation to its partisans that it did not wholly pass away from the minds of men, and if its application was rare and its instances unimportant, the precedents are valuable and full of hope and encouragement as evidence of the strength and vigor of the principle.

Therefore as precedents, I shall enumerate briefly and in

<sup>1</sup> Moore's Application of the Principles of International Arbitration on the American Continents, in the Annals of the American Academy of Political Social Sciences, Vol. 22, pp. 35, 42.

summary form various instances of arbitration of the Middle Ages.<sup>1</sup>

There are a few instances of arbitration among the barbarian tribes before the overthrow of the Roman Empire. For example, the Gepidæ proposed arbitration to the Lombards and declared it unjust to use violence toward those who demand a judge. Theodoric, king of the Ostro-Goths, sent ambassadors to the kings of the Herulians and Varnes asking them to join in inviting Clovis, king of the Franks, to cease his wars against the Visigoths and to accept the arbitration of the united kings—an offer accepted by Clovis.

In the period following the fall of Rome, instances of arbitration exist in which popes and bishops of the Church functioned as arbitrators. Emperors, kings, cities, commissions and eminent jurists were chosen as arbitrators and rendered acceptable awards. Of each of these in turn.

Innocent III declared the Pope the sovereign mediator on earth, a claim inconsistent with arbitration, for the Pope in such cases would act as sovereign judge, not as arbitrator, and an arbitration, if it exist at all, would be forced not voluntary.

Alexander III, Honorius III, John XXII, and Gregory XI arbitrated great European quarrels. Alexander VI settled a dispute between the Spaniards and Portuguese as to the new world by drawing an imaginary line from pole to pole. It is doubtful if this latter can be considered a case of arbitration. After the sixteenth century the kings objected to the popes' pretensions, and Clement VIII, made arbitrator of disputes under the treaty of Vervins (1598), resigned his mission owing to friction with Charles Emanuel, Duke of Savoy. In the seventeenth century Gregory XV arbitrated the question of the forts of the "Valteline." In the eighteenth century Clement XI served as umpire between Louis XIV and Leopold I who were arbitrators under Article 8 of the treaty of Ryswick.<sup>2</sup>

<sup>1</sup> For fuller statement of the instances and specific references to sources, see Moore's *International Arbitrations*, Vol. V, pp. 4825-4833.

<sup>2</sup> Du Mont, *corps universel diplomatique*, VIII, 1-98; Schmaus, *corpus*

Instances in which bishops were chosen and served as arbitrators are the following:

By the treaty of Nonancourt (1177) three bishops arbitrated between Louis le Jeune and Henry II of England concerning some fiefs. In 1276 two bishops and a warrior were made judges between the kings of Hungary and Bohemia, and in 1475 Louis XI and Edward of England referred disputes to the Archbishop of Paris and the Count Dunois (for Louis) and the Archbishop of Canterbury and the Duke of Clarence (for Edward).

The Emperors of the Holy Roman Empire aspired to be arbitrators, but as their claim of superiority was as unacceptable as the claim of the Pope to temporal supremacy, the instances are rare in which they were chosen and acted as arbitrators. In these few instances everything was excluded that would imply supremacy over other monarchs. In 1378 the Emperor Charles IV went to Paris to decide a controversy between France and England under these conditions.

It is stated that feudalism with its system of vassalage pre-disposed the vassals to accept their lords as judges, but the relation of superior to inferior was fatal to arbitration in the broad and equitable sense of the word. The over-lord appeared rather as judge than arbitrator and imposed his sentence upon the inferior. The same objection did not apply to monarchs who recognized each other's independence and equality and, therefore, kings as such were frequently chosen, especially the kings of France. St. Louis was judge between Henry II of England and his barons in 1263, and between the Counts of Luxemburg and Bar in 1268. Philip VI, Charles V, Charles VII, Louis IX and Louis XI served as arbitrators.

*juris publici academici*, No. 101; Klüber et Ott, *Droit des gens moderne de l'Europe*, 82, 456.

The treaty of Ryswick referred to here was the treaty between the Empire and France, October 30, 1697. Article VIII submitted the claims of the Duchess of Orleans, as to certain places restored to the Elector Palatine, to their Imperial and Most Christian Majesties, and, in case they could not agree, to the final decision of the Pope.—Moore, *Int. Arb.* Vol. V, pp. 4826-4827.



Other monarchs are known to have acted as arbitrators; for example, Henry II and William III of England.

In the classic examples of arbitration Greek cities were frequently chosen as arbiters, and the tradition was continued in the Middle Ages; for example, the Republic of Hamburg was chosen, by the treaty of Westminster (Article 24), to act as arbitrator between Great Britain and France and to decide the question of damages on both sides from the year 1640.<sup>1</sup> The Grand Council of Malines in 1665 passed upon the obligation of a debt, called the debt of Hofyser between Frederick William, of Brandenburg, and the States-General of the United Provinces, and the States-General arbitrated controversies relating to the fortified places and auxiliary points between France and Spain after the peace of Nimeguen. The parliaments of France, "renowned for their wisdom and equity" were chosen to settle disputes between foreign sovereigns.

Commissions of arbitration were known and employed; for example, it seems that in 1299 certain commissioners were sitting in Paris

to redress damages done to merchants of various nations by a French admiral within the English seas.<sup>2</sup>

There are not a few instances of arbitration by eminent jurists. The doctors of the Italian universities of Perugia and Padua, and particularly of the celebrated University of Bologna, were often employed as diplomatists or arbitrators to settle conflicts between the different States of Italy. The right of the house of Farnese to the throne of Portugal was decided by them. Alciat, one of the most famous, decided the rights of sovereignty and independence of the Principalities of Italy and Germany, and in France, Jean Bégat, counselor of the parliament of Dijon, was an arbitrator between Spain and Switzerland in relation to Franche Comté (1570).

<sup>1</sup> De Flassan, III, 200. (Article XXV also provided for the submission in the same manner of a question as to the possession of certain forts in America.—Moore, *Int. Arb.* Vol. V, p. 4828.)

<sup>2</sup> Hall, *Int. Law*, 4th ed., 147; Moore, *Int. Arb.*, Vol. V, p. 4831.

In the seventeenth century several treaties were concluded prescribing recourse in clearly defined cases to arbitration. For example, in the treaty of 1606 between James I of England and Henry IV of France international courts of commerce were created, to consist of two French and two English merchants to be chosen in Rouen and in London, to act as local courts on complaints of citizens of the foreign country. "Like establishments" were to be made in the cities of Bordeaux, and Caen, as also in the cities and towns of the Kingdoms of Great Britain and Ireland,

to take care of the weights and measures in every city of the one and the other Kingdom, so that there may be no fraud or abuse on either side.

They were also charged to prevent fraud and abuse and to inspect merchandise.<sup>1</sup> In 1648 the treaty of Münster provided that the controversy concerning Lorraine should be referred to arbitrators, and in 1659 the Peace of the Pyrenees (articles 108 to 110) provided for the appointment of commissioners with power to agree

"concerning all things to be yet executed, either touching the interests of the said lords and kings or the interests of the commonalties and private persons, their subjects, who shall have anything to demand or complaint to make on either side," and also "to regulate the limits as well between the dominions and countries that of old have belonged to said lords and kings, about which there have been some debates, as between the dominions and lordships that are to remain to each of them, by the present treaty, in the Low Countries;"

and in case they should be unable to agree, it was stipulated that "arbitrators" should be appointed to take cognizance of "whatsoever shall remain undecided between the said commissioners," and that the "judgments" rendered by the arbitrators should "be executed on both sides without any delay or difficulty." Articles 122 and 123 of the same treaty are especially interesting, inasmuch as they provide that the

<sup>1</sup> See, for a somewhat similar provision for a commercial tribunal, Article XXI of the treaty between Spain and the Low Countries, signed at Münster, January 30, 1648.—Moore, *Int. Arb.*, Vol. V, p. 4832.

high contracting parties (Spain and France) should prosecute their claims against either of the party's allies "by right, before competent judges, and not by force."<sup>1</sup>

In 1656 Cromwell and the King of Sweden decided to submit claims under the treaty of Upsal to arbitrators.<sup>2</sup> In 1672 Charles II, in declaring war against the United Provinces, alleged as a cause the refusal to send commissioners for the regulation of trade in the East Indies.<sup>3</sup> In 1679, by Article 8 of the treaty of Ryswick between France and Great Britain, provision was made for the appointment of commissioners "to examine and determine the rights and pretensions" of the contracting parties "to the places situated in Hudson's Bay."<sup>4</sup> Article 10 of the treaty of Ryswick between France and Spain (1697) provided for the submission to arbitration of the question of the possession of eighty-two towns.<sup>5</sup> Articles 10 and 11 of the treaty of Utrecht between France and Great Britain (1713) provided for the appointment of commissioners to fix the boundaries between Hudson's Bay and the places appertaining to the French (Article 10), and to adjust claims made by the subjects of each country against the other growing out of various incursions, depredations and spoliations (Article 11).<sup>6</sup> And, finally, the treaty of Passarowitz of 1718 between the Emperor of Germany and the Sultan made provision for reference to commissions of all controversies which might arise "concerning any articles of this armistice, or any other thing." (Article 9). Article 5 of the same treaty provided that commissioners were to be chosen to determine the limits of "Dalmatia, Erzegovina, Albania, and the Archipelago" and Article 16 specified in broad and general terms that

whenever quarrels and animosities arise on the frontiers by reason of murders or other cause, they shall be decided according to equity by the arbitration of the governors of those borders.<sup>7</sup>

<sup>1</sup> Moore, *Int. Art.*, Vol. V, pp. 4832-4833.

<sup>2</sup> *Ibid.*, p. 4833.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

In speaking of the rules prescribed for the guidance of arbitrators, M. Mérignhac says:

If we should try to find judicial rules that governed arbitration in the different periods at which we have glanced, we should discover that they did not present great stability, and that they varied with different litigations. The choice of arbitrators fell generally on monarchs, and exceptionally on arbitral commissions or private individuals. A period was sometimes fixed either for the meeting of the arbitrators (the treaty of Vervins of 1598, Article 17, provided that it should take place in six months) or for the rendering of the decision (the Treaty of Westminster of 1655 allowed six months and a half). Sometimes a penal clause was inserted, by which a penalty was imposed on the party who refused to submit to the decision; for example, the treaty of the 9th of August 1475, between Louis XI and Edward IV, prescribed a sum of three million francs.<sup>1</sup>

The procedure likewise varied with the case, but usually had a judicial aspect; for example, in the dispute between the Dukes of Savoy and Mantua and the Marquis of Saluces, Charles V designated certain persons to examine the matter in dispute, to take testimony, and upon their advice and in accordance with the evidence found, rendered his judgment. Lawyers appeared before the persons designated by Charles V to argue the case of their clients. The clause *compromissoire*, that is, the agreement to arbitrate future difficulties, does not appear to have been frequent in the Middle Ages, or, indeed, in later times. It appears, however, to have been employed by the commercial cities of Italy and Switzerland.<sup>2</sup> Two instances may be cited: In a treaty of alliance concluded in 1235 between Genoa and Venice there is an arbitration clause which reads as follows:

If a difficulty should arise between the aforesaid cities, which cannot easily be settled by themselves, it shall be decided by the arbitration of the Sovereign Pontiff; and if one of the parties

<sup>1</sup> Quoted from Moore's *Int. Art.*, Vol. V, p. 4829.

<sup>2</sup> Vattel, *Le Droit des gens*, L. II, C. XXVIII, sec. 329, t. II, p. 58. *Conf. Histoire de la Confédération helvétique*, de A. L. by Watteville, L. IV; Moore, *Int. Arb.*, Vol. V, p. 4830.



violate the treaty, we agree that His Holiness shall excommunicate the offending city.<sup>1</sup>

In the "Perpetual Peace" of 1516 between Francis I and the Swiss Cantons, the following clause is found:

Difficulties and disputes that may arise between the subjects of the King and the inhabitants of the Swiss Cantons, shall be settled by the judgment of four men of standing, two of whom shall be named by each party; which four arbitrators shall hear, in an appointed place, the parties or their attorneys; and, if they shall be divided in opinion, there shall be chosen from the neighboring countries an unbiased man of ability, who shall join with the arbitrators in determining the question. If the matter in dispute is between a subject of the Cantons and Leagues and the King of France, the Cantons will examine the demand, and, if it is well founded, they will present it to the King; but, if the King is not satisfied with it, they may call the King before the arbitrators, who shall be selected from among impartial judges of the countries of Coire or of Valois, and whatever shall be decided by the aforesaid judges, by a judicial or amicable sentence, shall be inviolably observed without any revocation.<sup>2</sup>

It is thus seen that arbitration was frequently resorted to in the Middle Ages, but, although the instances are numerous, considered by themselves, they are both trifling in importance and number when compared to the multitude of controversies settled by the sword. If examined carefully they cannot be said to be arbitration in the strict sense of the word, because the Church in the height of its power imposed its will upon parties in controversy. The Papacy was in reality more of a mediator than an arbiter. The distinction between these forms of peaceable settlement does not seem to have been observed, if it was understood. Indeed, mediation was as consistent with a claim of supremacy as arbitration was inconsistent and irreconcilable with the claim and exercise of unlimited supremacy.

In the same way the emperor was more of a mediator than an arbiter, and to exclude his intervention as mediation it was necessary to limit his powers in the individual case in such

<sup>1</sup> Moore's Int. Arb. Vol. V, p. 4830.

<sup>2</sup> Ibid.

a way as to exclude the claim and exercise of supremacy on the one hand, and the position of mediator on the other. The conception of sovereignty, regardless of clerical and imperial pretension, the recognition of the equality of states, irrespective of religious preferences or forms of government, consequent upon the Reformation and the treaty of Westphalia, laid the foundations indispensable to arbitration in the proper sense of the word. M. Mérignhac is therefore justified by theory as well as fact when he states and illustrates by example the difficulty of distinguishing between arbitration and mediation before the seventeenth century. The importance of the subject and the necessity of the distinction justify a further quotation from this distinguished authority.

In 1334 Philip of Valois declared himself elected judge, negotiator, and arbitrator between the King of Bohemia, the Princes of Germany, and the Duke of Brabant. Sometimes the mediation was of an obligatory nature, owing to the fear inspired by the mediator's being able to impress his views by force of arms. Thus Henri IV acted as mediator between the Republic of Venice and Pope Paul V. The Pope counted on Spain's sustaining him; but Henri IV, in order to oppose the forces of that country, made propositions to the Swiss to raise ten thousand men; so that the Pope was finally obliged to submit to the will of the French King.

But from the year 1595 we find the distinction between mediation and arbitration clearly defined by the French ministers, who interposed between the Protestants and Catholics, who were on the point of coming to blows on the subject of the expulsion of Catholic magistrates from Aix-la-Chapelle and of their replacement by a Protestant magistracy. "We declare to you," say the ministers on the part of His Majesty (the King of France), "that he has no design of prejudicing the authority and the rights of the Emperor, of the Empire, of any prince, or of any person; and in order that the pending dispute may be discussed in an easy and orderly way, we invite you respectively to depute peaceable and dispassionate men, who can confer with us in all confidence and safety, and we will listen patiently to whatever they may say and propose, *not as judges or arbitrators, but as mediators and amicable compositors.*"<sup>1</sup>

In view of the classical precedents of arbitration and the

<sup>1</sup> Quoted from Moore's Int. Arb., Vol. V, p. 4831.

various instances of its application in the Middle Ages, and its conventional recognition in treaties between powers of influence and standing, it is difficult to understand why arbitration as such seems completely to have disappeared from the public law of the eighteenth century. In his *International Law*, published in 1819, the distinguished publicist, Klüber, thoroughly familiar with the theory and practice of international law, called attention to the fact that arbitration had been strangely neglected and asked the pertinent question:

Why do we never go back to arbitrators? At most we accept the mediation of a third power, but this is usually ineffectual. There is no longer anything but war, so to speak, which can insure the inviolability of the laws.<sup>1</sup>

Rousseau had already answered the query,

Could they submit themselves to a tribunal of men who boasted that their power was founded exclusively on the sword, and who bowed down to God only because He is in Heaven?<sup>2</sup>

Arbitration as a judicial settlement of controversies is opposed to force in every form, and can only bring forth the fruits of peace when the disputants are animated by a desire to do justice and to conform themselves to its dictates.

#### 4. INSTANCES OF ARBITRATION FROM JAY'S TREATY (1794)

Arbitration in the sense of the present day dates from Jay's Treaty of 1794 in which Great Britain and the United States bound themselves to arbitrate contested boundary claims (Article 5); claims preferred by British creditors (Article 6); and, more especially, the claims of American and British creditors based upon "irregular or illegal captures or condemnations of their vessels and other property" (Article 7).

Criticised at the time as a surrender to Great Britain, its commercial provisions denounced as wholly inadequate,

<sup>1</sup> *Droit des gens*, §318, note *a*.

<sup>2</sup> Moore, *Int. Arb.*, Vol. V, p. 4829.

carried without a vote to spare in the Senate, and in the matter of appropriation by the narrow majority of three in the house of representatives, due to the timely and masterly intervention of Fisher Ames, this treaty, which ruined the political career of Jay and deprived him of the presidency to which he seemed destined, is not only the vindication of Washington's selection of Jay, and an adequate testimonial to the ability and legal attainments of its negotiator, but by common consent, the starting point of international arbitration. As a statesman, were other evidences lacking, Jay might have been content to rest his claim to remembrance upon the treaty; of his standing as a jurist, notwithstanding his elevated position as first chief justice of the United States, the treaty is sufficient evidence. On a higher and broader plane as a friend of peace and a lover of his kind, the treaty is and always will be an imperishable monument. It is given to few men to sign a treaty which recognizes the independence of their country (Treaty of September 3, 1783); to negotiate a treaty which prevented war and secured the blessings of peace (Treaty of 1794); and to devise an instrument at once simple, reasonable and fitted both in theory and practice to diminish war by the peaceful and judicial settlement of international conflicts (Treaty of 1794, Articles 5, 6, 7). It may be proper to note in passing that the son was worthy of the father, for the proposal to insert in future treaties a general clause to arbitrate difficulties arising under such treaties, to which practical effect is now given, is found in William Jay's little tract on War and Peace, published in Great Britain and the United States in 1842.

The articles in Jay's Treaty to which reference has been made provide for the arbitration of outstanding difficulties by means of mixed commissions. The loosely drawn charters of the colonies, granting as they did vast tracts of territory, gave rise to numerous and bitter controversies between the colonies, some of which were settled by the Continental Congress, others by means of the commission of arbitration devised by the ninth article of the Confederation, and still others



decided by the Supreme Court of the United States in suits to which states of the Union were parties. Jay, himself, was commissioner of the state of New York in its controversy with Vermont, and was therefore familiar in practice as well as theory with disputes of this nature. As chief justice of the United States he would naturally prefer a judicial to a diplomatic settlement of such controversies. The British Government was equally familiar with the settlement of disputed claims by mixed commissions and in several treaties negotiated by Cromwell as Lord Protector, ample provision was made for the institution of such commissions.

The first of Cromwell's series of treaties containing an agreement to arbitrate outstanding difficulties by means of mixed commissions, is the so-called Treaty of Westminster (April 5, 1654)<sup>1</sup> between England and the Netherlands. Article 28 of this remarkable treaty provides that the losses suffered by the seizure and detention of English effects in Denmark since May 18, 1652,

"shall be made good according to an appraisement to be made by Edward Winslow, James Russell, John Bex and William Van der Cruysen, Arbitrators indifferently chosen, as well on the part of his Highness as of the said States-General (the Form of Instrument of Arbitration is already agreed on) to examine and determine the Demands of the Merchants, Masters and Owners, to whom the said Ships, Effects, and Losses appertain." Article XXX provides for the appointment of four commissioners "to examine and distinguish all those losses, and injurys, in the Year 1611, and after to the 18th of May 1652 as well in the *East Indies*, as in *Greenland*, *Muscovy*, *Brazil*, or wherever else, either party complains of having suffered them from the other."

In case of failure to adjust the differences within the period of three months, the article provided for their submission "to the Judgment and Arbitration of the Protestant Swiss Cantons,"<sup>2</sup>

<sup>1</sup> A General Collection of Treatys of Peace and Commerce (1732), Vol. III, pp. 76-79; Jenkinson's Collection of all the Treaties of Peace, Alliance and Commerce, between Great Britain and other Powers (1758), Vol., pp. 44, et seq.

<sup>2</sup> It was provided by a subsequent agreement that the cases undetermined by the commissioners should not be referred to the Swiss Cantons

who shall be requir'd, by the Instrument already agreed on, to assume that Arbitration in such Case and to delegate Commissions of like nature for the same purpose, so instructed that they shall give Judgment within the six months next following the expiration of those three months; and whatsoever such Commissions, or the major part, shall determine within the said six months, shall bind both Parties, and be well and truly perform'd."

The treaty thus provides for the appointment of a mixed commission to be composed of two competent persons, selected by each of the contracting parties, in the hope that they would reach an agreement and thus terminate the difficulty; but contemplating their inability to agree, the treaty provides for the submission to the arbitration of a neutral power.

The commission delivered its sentence concerning the English ships and effects seized and detained in the dominions of the King of Denmark, since the 18th of May, 1652 (Article 28), on July 31, 1654,<sup>1</sup> and on August 30, 1654, the com-

for settlement, but should be referred and resubmitted to the judgment and arbitration of the commissioner "who published the said award and arbitration [of August 30, 1654] or of others who shall be nominated and constituted on both sides."—Jenkinson's Treaties, pp. 66-68.

<sup>1</sup> When after the recital of so much of the said treaty as relates hereto, and that the merchants had conformed to the methods prescribed, and the commissioners, Edward Winslow, James Russell, John Bex, and William Van der Cruysen, examined and duly deliberated upon the matters before them; they, the said commissioners, do under their hands and seals determine to decide and finally pronounce, that the damages so often mentioned, amount to 97,973 pounds and ten pence, lawful money of England: and are accordingly so taxed and liquidated, and do therefore decide and pronounce, that the said Lords the States General shall pay or cause to be paid the sum of 97,973 pounds and ten pence, lawful English money in London, for the use of the respective owner, to such person or persons as his Highness the Lord Protector shall appoint, within twenty-five days after this our award.

Indorse.

In witness, &c.

N. B.—That we the commissioners do find that the sum of 5000*l.* sterling, and 20,000 rixdollars, amounting together to the sum of 10,000*l.* sterling, is paid, which according to the tenor of the 28th article is to be reckoned in part of payment of the above sum, declared as above mentioned.

In witness, &c.

—Jenkinson's Treaties, Vol. I, pp. 50-51.

missioners appointed in pursuance of the thirtieth article to appraise the losses of the East and West India Companies delivered a careful, detailed and definitive sentence.<sup>1</sup>

The treaty with Holland was not an isolated example of Cromwell's wisdom in settling international controversies by judicial and therefore peaceable means; for example, the treaty of Westminster of July 10, 1654, between England and Portugal, provided that "Demands on account of Losses shall be referred to Arbitration for Satisfaction" and constituted a commission, composed of two Englishmen and two Portuguese, to sit at London on the 20th of July, 1654, and to deliver their sentence on or before the first Day of September. In case of failure to agree, the cases undetermined were to be referred "to such Member of the Lord Protector's Privy Council as the said Lord Protector shall nominate," whose decision was to be final and decisive.<sup>2</sup>

Article 24 of the treaty of Westminster of November 3, 1655, between Cromwell and Louis XIV, provided that "Whereas since the Year 1640 many prizes have been taken at Sea and both Nations, their People and Subjects, have suffered many Losses, 'tis agreed that three Commissioners shall be appointed on both sides" to settle the controversies at London, and in case of their inability to agree within six months and a fortnight, the City of Hamburg was to be requested to delegate commissioners, whose arbitration was to be final and their award made within four months.<sup>3</sup> Article 25 is of special interest to the American public, for it provides that the right of either of the contracting parties to the three forts of Pentacost, St. John, and Port Royal in America shall be determined by the same commissioners. We thus are afforded the pleasing spectacle of Louis XIV at the very be-

<sup>1</sup> The complaints of the litigating parties are set forth at length in Jenkinson's Treaties, Vol. I, pp. 51-66.

<sup>2</sup> A General Collection of Treatys, Vol. III, pp. 106, et seq.; Jenkinson's Treaties, Vol. I, pp. 71-75.

<sup>3</sup> A General Collection of Treatys, Vol. III, pp. 157, et seq.; Jenkinson's Treaties, Vol. I, pp. 81-85.

ginning of his career submitting, under the influence of Cromwell, to arbitration.

And, finally, by Article 7 of the Treaty of Westminster of July 15, 1656, between Cromwell and Sweden, it was provided that three commissioners shall be delegated and deputed on each side to adjust the differences and to settle the losses arising from capture during the war between England and the Netherlands.<sup>1</sup>

These various treaties of arbitration negotiated by Cromwell do indeed, to quote the language of the tory Jenkinson (first Lord Liverpool),

illustrate the bright side of this man, who in the light these particulars shew him, is worthy imitation; therefore those who write or speak of him with an invidious warmth, should consider, that if these facts be true, and that they cannot shew the same in behalf of their favorite kings, what a terrible sarcasm it is upon them, that a man whom they villify and abuse, is proved to be infinitely wiser and honestest than either such kings, or their advocates; and consequently in abusing him, express their contempt for virtue, and at the same time make their kings less estimable than the person whom they would have wicked beyond expression.

And in speaking of the convention as a whole, the same learned author declares that the "treaties are of a piece with all the rest of Cromwell's negotiation, and speak so well for themselves as not to need illustration."<sup>2</sup>

It is evident, therefore, that the submission to mixed commissions of disputed claims for indemnity, as well as the arbitration of disputed territory, was long familiar to English publicists and statesmen, and it is not astonishing that the request of Jay to submit the boundary disputes and the claims of British subjects and American citizens to mixed commissions should find favor with a British cabinet in which Jenkinson, the chronicler of these details, was an honored and influential member. The judicial settlement of international dis-

<sup>1</sup> A General Collection of Treatys, Vol. III, pp. 169, et seq.; Jenkinson's Treaties, Vol. I, pp. 98-101.

<sup>2</sup> Jenkinson's Treaties, Vol. I, p. 68.



putes is in the blood of the Saxon, and arbitration is in no small sense the gift of the English-speaking world.

### 5. COMPOSITION OF THE ARBITRAL TRIBUNAL

To revert to Jay's Treaty of 1794 which is, as previously stated, the starting point of modern arbitration. Article V provided that Great Britain and the United States should each appoint a commissioner and should agree upon a third. In case of their inability to agree, each should propose the name of a person and from the two names so proposed one should be drawn by lot in the presence of the original commissioners. The commissioners were to decide according to the evidence submitted to them by Great Britain and the United States "what river is the river St. Croix, intended by the treaty" (of 1783), and on October 25, 1798, the commissioners rendered an award at Providence, R. I., holding that the Schoodiac was the river intended under the name of the St. Croix.

Article IV of the Treaty of 1783 provided that

creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted;

but, notwithstanding this stipulation, certain of the United States had interposed impediments to the collection of British debts. To settle the unfortunate controversy, which reflected not a little upon the good faith of the United States, Article VI of the Treaty of 1794 provided that five commissioners were to be appointed, two by Great Britain, two by the United States, and

the fifth by the unanimous voice of the other four; and if they should not agree in such choice, then the commissioners named by the two parties shall respectively propose one person, and of the two names so proposed, one shall be drawn by lot, in the presence of the four original commissioners."

The subject was in itself difficult, and its settlement required

patience and no small degree of tact. The British commissioners were lamentably wanting in these qualities, and the American members withdrew from the commission. By the Treaty of January 8, 1802, the British Government accepted the lump sum of £600,000 in satisfaction of its demands. It is thus seen that arbitration under Article V was unimportant, and that the commission constituted by virtue of Article VI failed miserably to settle the controversy submitted to it.

The success and the importance of the treaty depended upon Article VII, which stated that

Whereas . . . . divers merchants and others, citizens of the United States, . . . . have sustained considerable losses and damage during the war between Great Britain and France by reason of irregular or illegal captures or condemnations of their vessels and other property, under color of authority or commissions from His Majesty, and that from various circumstances belonging to the said cases, adequate compensation for the losses and damages so sustained cannot now be actually obtained, had, and received by the ordinary course of judicial proceedings; it is agreed, that in all such cases, where adequate compensation cannot, for whatever reason, be now actually obtained, had, and received by the said merchants and others, in the ordinary course of justice, full and complete compensation for the same will be made by the British Government to the said complainants.

To determine such losses and damages, five commissioners were to be appointed and authorized to act in London, who should receive testimony, books, papers and evidence to support the various claims submitted and decide "the claims in question according to the merits of the several cases, and to justice, equity and the laws of nations." It was provided further that the award of the said commissioners or of any three of them should "in all cases be final and conclusive, both as to the justice of the claim, and the amount of the sum to be paid to the claimant."

The article contained like provisions for the settlement of claims of British subjects for the losses and damage sustained by reason of the capture of their vessels and merchandise, taken within the limits and jurisdiction of the States and brought

into the ports of the same, or taken by vessels originally armed in ports of the said States.

The five commissioners were to be appointed as provided in Article VI; that is to say, two by each of the contracting parties and the fifth by agreement or by lot. The four commissioners were unable to agree. In accordance with the usual practice in such cases, each side would have presented the name of a partisan, but in order to secure impartiality each side presented a list of four names from which list the other side selected a name and from these two one was drawn by lot. The name of Col. Trumbull was selected by this ingenious method. The American commissioners were Christopher Gore and William Pinkney, the distinguished lawyer. The British commissioners were John Nicholl, a very eminent civilian (afterwards succeeded by Maurice Swabey), and John Anstey. The fifth commissioner, Col. Trumbull, the well known artist, had been Mr. Jay's secretary in the negotiation of the treaty.

The commission was completely successful. The cases presented involved contraband, the rights and duties of neutrals, the right of the commission to determine its competency, and jurisdiction, and the finality of decisions of prize courts. Important in themselves, the opinions of the commissioners are remarkably careful and profound specimens of legal reasoning. Pinkney's opinion in the case of the *Betsey* (1) on the alleged finality of the decisions of prize courts was regarded as a masterpiece at the time of its delivery and is a classic in the subject of which it treats.<sup>1</sup> The commissioners not only justified their appointment by settling to the satisfaction of both countries difficult and intricate questions of international law, but the result of their labors showed the possibilities of a commission composed of competent jurists. The superiority of a mixed commission thus composed to a commission composed of diplomats was patent and undeniable.

The composition of the tribunal, however effective, is subject to serious criticism, for the fifth commissioner, who might

<sup>1</sup> Moore, *Int. Arb.*, Vol. III, p. 3180.

be called upon to decide the question submitted, and who actually did decide various questions, was intended to be a subject or citizen of the countries in litigation. It is difficult for the umpire in such cases to be absolutely impartial, and the suggestion, or, indeed, the suspicion, of partiality tends to discredit an award. As M. Renault has aptly said:

it is important in the highest degree that justice be not merely just, but that it appear to be so. It is absolutely necessary that we cannot suppose that various influences have made themselves felt and that the judge's vote took an account of considerations other than those of justice. The award then will have not only the effect of terminating the actual controversy; it will have an unquestioned moral value.<sup>1</sup>

If the commission be composed of representatives from the parties in controversy, it is in the interest of justice indispensable that the umpire shall be a stranger to the dispute.

Opposed to the mixed commission is the arbitration of a single individual, generally a sovereign, to whom the question is submitted for settlement. A defect of the mixed commission is the presence of citizens of the parties in litigation, and a particular fault of the commissions under the Jay Treaty was that the umpire was to be a citizen or subject of one or the other party. Arbitration by a sovereign is not subject to this criticism; for the sovereign chosen as arbiter will undoubtedly be a stranger to the dispute, and his judgment on this account is to be regarded with favor. But arbitration by a sovereign has defects peculiarly its own; for example, the entire case is submitted to him without argument, and he decides solely on documentary evidence without the benefit arising from the animated discussion of counsel. In the second place, the sovereign is rarely competent to master the case in all its details, and, if he possesses the ability, he does not have the time to sacrifice legitimate affairs of state to the controversies of strangers. The case is, therefore, not considered by the sovereign, but is referred to an official for examination and report.

<sup>1</sup> De Lapradelle et Politis: *Recueil des Arbitrages Internationaux*, Vol. I, p. xi.



And, finally, the political situation of the sovereign requires that he be very circumspect in his judgment, for in deciding the case he does not wish to take sides or to injure the sensitiveness of either litigant, nor does he desire to establish a precedent which may embarrass him or his country in the future. If the decision be correct, it does not as a rule state the reasoning by which the conclusion is reached, and while it may decide the immediate controversy—there is but one instance of an award of a sovereign being rejected—the judgment is of little or no value as a precedent.<sup>1</sup> The strength of the mixed commission, on the contrary, rests in the reasoning by which the conclusion is supported, especially in Anglo-American commissions, where each judge sets forth at length the principles of law and the authorities in point which have led him irresistibly to the conclusion reached. Special reference is made to the commission under Article VII of the Jay

<sup>1</sup> Arbitration in the strict sense, as by a sovereign, has both good and bad qualities. In his sovereign and independent capacity the arbitrator can more freely pronounce his sentence. At the same time he would not care to lay himself or his ruling open to criticism, and so his award would very rarely be accompanied by a statement of the grounds or principles upon which it was based. Many important questions of law have been involved in some of the cases of arbitration by sovereigns; thus, the legal effects of military occupation in the dispute which arose between Great Britain and the United States as to the interpretation of Article 1 of the Treaty of Ghent (December 24, 1814), when Alexander I of Russia arbitrated; limits of the power of an arbitrator as to disputed territory in the north-eastern frontier case, the decision of William I of Holland being rightly repudiated, because he disregarded the terms of the reference; the question of blockade in the Portendic affair (1843), the award of Frederic William IV of Prussia not being supported by stated reasons or principles; the effects of declaration of war in regard to the responsibility of a belligerent towards his adversary in the arbitration by Queen Victoria between France and Mexico (1844); the effect of declaration of war as to confiscation, William III of Holland arbitrating between France and Spain (1852); the responsibility of a neutral State for belligerent hostilities in its territorial waters, in the General Armstrong case, Louis Napoleon arbitrating between the United States and Portugal (1852). Some of these awards have been severely criticised, but, nevertheless, they all have important bearing on the progress of international law.—Phillipson's *Studies in International Law*, pp. 20–22.

treaty, and, in a lesser degree, to the Anglo-American commission of 1853.

The presence in the commission of citizens or subjects of the litigating parties questions in advance the impartiality of the award, and while the fear of this may cause the commissioner to fortify his decision by principle and precedent, he is, in no small sense of the word, regarded as an advocate. If the umpire belongs to either of the contending parties, the suspicion is strengthened. There was great danger that this method of constituting commissions might discredit in no small measure the cause of arbitration.<sup>1</sup>

An attempt was made to secure impartiality of the commission by a provision that a commissioner should be appointed by each of the contending parties, and in case of their disagreement reference to a sovereign as arbitrator.<sup>2</sup> But this experiment failed to commend itself either in theory or practice and has been abandoned.

In the next place, the commission was formed by an equal number of citizens of the contending parties, each of whom appointed an arbitrator, from which two one was chosen by lot.<sup>3</sup> This innovation was unsatisfactory, as was also the appointment of an umpire by a sovereign designated in the treaty, to whom the two commissioners should present their differences.<sup>4</sup> And yet, however inadequate the machinery, the idea which suggested the innovation was just, namely, that the ultimate decision should not depend upon citizens or subjects of the contending countries, but upon a disinterested party.

The arbiter, it would seem, should take part in the proceedings from the beginning, otherwise delay is inevitable.

<sup>1</sup> De Lapradelle et Politis: *Recueil des Arbitrages Internationaux*, Vol. I, p. 39.

<sup>2</sup> Treaty of Ghent between Great Britain and the United States, December 24, 1814.

<sup>3</sup> Mixed Commission of 1826.

<sup>4</sup> Mixed Commission of 1842 and the Commission of 1844 for the settlement of the Portendic incident.—De Lapradelle et Politis: *Recueil*, Vol. I, pp. 512–544.

Therefore, the modern tendency is, in cases in which a mixed commission is appointed, to select the umpire at one and the same time, or to permit his selection by the commissioners from among disinterested parties, so that the casting vote shall carry with it no suggestion or suspicion of partiality.

It is essential, however, to the success of the commission, that its members be competent lawyers, not diplomats, as law is to be applied, not compromised; for, to quote again M. Renault,

international arbitration will only be developed seriously in absolutely leaving the field of politics and diplomacy, where it was long confined, to repose in the judicial field, which it has only entered. It is on this sole condition that confidence will be inspired in governments and people; that it will offer guarantees especially to the little States, too often the victims of political considerations. The arbiters are politicians, diplomats, magistrates, jurists of profound learning. They are in the highest degree penetrated by interests of their country, as is natural, but if they have a correct view only of the sacred character of the mission confided to them, they ought to develop a judicial point of view in order to appreciate the difficulty submitted to them.<sup>1</sup>

The essentials, therefore, of a mixed commission are, that it be composed of jurists, capable lawyers, not diplomats; that the umpire be selected from a neutral country; that he take part in the proceedings from the beginning, so that he may benefit by the arguments and discussion and that his vote be cast in the fullness of knowledge.

As practical examples of recent and highly successful arbitrations in which the national element was represented but was controlled by the presence of foreigners, reference may be made to the Anglo-American Mixed Commission of 1872,<sup>2</sup> the

<sup>1</sup> De Lapradelle et Politis: *Recueil des Arbitrages Internationaux*, Vol. I, p. 10.

<sup>2</sup> The high contracting parties agree that all claims, other than the Alabama claims, arising between the United States and Great Britain, between April 13, 1861, and April 9, 1865, inclusive, "shall be referred to three commissioners, to be appointed in the following manner, that is to say: one commissioner shall be named by the President of the United States, one by Her Britannic Majesty, and a third by the President of the United

Geneva Arbitration of 1872,<sup>1</sup> and the Bering Sea Arbitration of 1892.<sup>2</sup>

The ideal tribunal of arbitration would be one before which the parties were represented by competent agents and counsel, but composed of distinguished jurists selected from foreign countries who were not only strangers to the controversy but had no interest in its settlement. They would be arbitrators in the highest sense of the word, because they would be judges freely chosen by the parties, though not from among their citizens or subjects. But nations seem unwilling to exclude themselves from the bench and entrust their controversies wholly to strangers.

The two ideas have struggled for mastery, one a commission composed of the litigating parties, and the other a decision by a single sovereign arbitrator who either is or is supposed to be indifferent to the controversy in question. The result seems to be a happy compromise, for the tribunal of arbitration of the present day is composed of an equal number of judges selected by each litigant under the presidency of an umpire chosen from a neutral nation.

It will be seen later how the First Hague Conference codified

States and Her Britannic Majesty conjointly; and in case the third commissioner shall not have been so named within the period of three months from the date of the exchange of the ratifications of this treaty, then the third Commissioner shall be named by the representative at Washington of His Majesty the King of Spain.—Treaty of Washington, May 8, 1871, Art. XII.

<sup>1</sup> Treaty of Washington, May 8, 1871, Art. I: "The High Contracting Parties agree that all the said claims, growing out of acts committed by the aforesaid vessels, and generically known as the 'Alabama Claims,' shall be referred to a tribunal of arbitration to be composed of five Arbitrators, to be appointed in the following manner, that is to say: One shall be named by the President of the United States; one shall be named by Her Britannic Majesty; His Majesty the King of Italy shall be requested to name one; the President of the Swiss Confederation shall be requested to name one and His Majesty the Emperor of Brazil, shall be requested to name one."

<sup>2</sup> In the treaty of February 29, 1892, for the settlement of the fur seal question, the tribunal of arbitration was composed of seven arbitrators appointed as follows: "Two shall be named by the President of the United



the practice of nations, and how the Second Conference of 1907 attempted to secure a larger degree of impartiality by providing that each litigant should be limited in his choice of arbitrators to one of its citizens or subjects.

Arbitration is so well known in history and in practice that opposition to it as a means for the judicial settlement of international difficulties has well-nigh ceased. It is insisted, however, that certain questions involving the independence, vital interests or honor of nations be excluded from arbitration. If the question were a new one, much might be said for this limitation or restriction of the field of arbitration; but the question is not new, and the practice of nations in the past century shows unmistakably that nations have submitted such a variety of questions to arbitration and have accepted the decision when rendered, whether adverse or favorable, that the only limit to arbitration is the desire or willingness of the contending parties to resort to reason rather than to force.

#### 6. FREQUENCY OF ARBITRATION IN THE NINETEENTH CENTURY

It has been previously stated that modern arbitration dates from Jay's Treaty of 1794, and the first award under it was made in 1798, so that exactly one hundred years elapsed until the call of the First Hague Conference. Arbitrations in this period were very frequent. Writers differ as to the exact number; for example, Dr. Darby instances no less than 471 cases, but in his enthusiasm for the peaceful settlement of international differences he has included a large number of interstate arrangements, which cannot be regarded as inter-

States; two shall be named by Her Britannic Majesty; His Excellency the President of the French Republic shall be jointly requested by the High Contracting Parties to name one; His Majesty the King of Italy shall be so requested to name one; and His Majesty the King of Sweden and Norway shall be so requested to name one. The seven arbitrators to be so named shall be jurists of distinguished reputation in their respective countries; and the selected Powers shall be requested to choose, if possible, jurists who are acquainted with the English language." (Article I.)

national arbitrations in the strict sense of the word.<sup>1</sup> Mr. Fried, in his *Handbook of the Peace Movement*, enumerates some 200.<sup>2</sup> M. La Fontaine gives a list of 177 instances to the year 1900, which should be reduced to 171 arbitrations or agreements to arbitrate before the meeting of the First Conference in 1899.<sup>3</sup> Professor John Bassett Moore is more conservative and enumerates 136 cases of international arbitration during the nineteenth century, in 57 of which the United States was a party, with a like number of 57 to which Great Britain has been a party.<sup>4</sup>

But, as happily said by M. Descamps, arbitration is not a question of mathematics,<sup>5</sup> and whether the instances be 471, according to Darby, or 136, according to Professor Moore, the recourse to arbitration bids fair to become a habit with nations.

The chronological enumeration of the instances of arbitration would be wearisome and unprofitable, for the present purpose is twofold: to show the frequency with which nations resort to arbitration, and to indicate at one and the same time the nature of the controversies arbitrated. A simple statement of the number of instances suffices for the first head; a brief statement of some of the more important questions, with a classification of the various subjects arbitrated, will suffice to show the nature and extent of arbitration within the hundred years preceding the First Hague Conference.

<sup>1</sup> Darby's *International Tribunals*, 4th ed., pp. 769-900.

<sup>2</sup> Fried, pp. 125-153.

<sup>3</sup> *Histoire Sommaire et Chronologique des Arbitrages Internationaux (1794-1900)*.

<sup>4</sup> *A Hundred Years of American Diplomacy*, 14th Harvard Law Review, 165, pp. 182-183, notes.

<sup>5</sup> Mais l'exactitude mathématique est secondaire ici: ce qui n'est pas contestable, c'est que les cas d'arbitrage, fort clairsemés à l'origine offrent à l'annaliste une moisson de plus en plus riche de précédents juridiques intéressants.—*Essai sur l'organisation de l'arbitrage International* (1896), p. 16. This admirable essay, prepared at the instance of the Interparliamentary Union, is also printed in *Revue de droit International et de législation comparée*, Vol. XXVIII, (1896), pp. 5-74.

See also, M. Descamps' *Relevé Général des clauses de médiation et d'Arbitrage*, prepared at the request of the First Peace Conference and printed in *Conférence Internationale de la Paix*, 1899, part I, pp. 138-151.

M. La Fontaine arranges in tabular form the arbitrations from 1794 to 1900. To the period from 1794 to 1800 he assigns four arbitrations; to the period from 1801 to 1820, eleven; from 1821 to 1840, eight; from 1841 to 1860, twenty; from 1861 to 1880, forty-four; from 1881 to 1900, ninety. It is thus seen that, excluding from consideration the period from 1794 to 1820, when arbitration was slowly but surely coming into favor, arbitration has doubled within each period.<sup>1</sup>

Jay's Treaty was negotiated to prevent war, but it should not be looked upon as a concession to fear, although an appeal to reason, whatever the motive may be, is always preferable to an appeal to arms, on the theory that even a bad peace is preferable to war. It represented the firm, and, it is to be hoped, the unalterable conviction of our country that war, if ever permissible, can only be a last resort, and that it is a crime to draw the sword for the redress of wrongs if peaceful means can be found or devised to settle an international controversy.

<sup>1</sup> The following table, taken from M. La Fontaine, shows the participation of each State in arbitration:

Great Britain.....	70	Bolivia.....	3
United States of America.....	56	Paraguay.....	3
Chili.....	26	Salvador.....	3
France.....	26	Transvaal.....	3
Peru.....	13	Austria.....	2
Portugal.....	12	Belgium.....	2
Brazil.....	11	Greece.....	2
Argentina.....	10	San Domingo.....	2
Spain.....	10	Siam.....	2
Nicaragua.....	9	Sweden and Norway.....	2
Italy.....	8	Switzerland.....	2
Mexico.....	8	Uruguay.....	2
Venezuela.....	7	China.....	1
Colombia.....	6	Congo.....	1
Gautemala.....	6	Denmark.....	1
Honduras.....	6	Egypt.....	1
Costa-Rica.....	5	Japan.....	1
Ecuador.....	5	Orange.....	1
The Netherlands.....	5	Persia.....	1
Haiti.....	4	Turkey.....	1
Russia.....	4		

—Histoire Sommaire et Chronologique des Arbitrages Internationaux, 1794-1900, pp. 4 and 5.

In the midst of the Revolution Dr. Franklin wrote:

We make daily great improvement in natural, there is one I wish to see in moral, philosophy: the discovery of a plan which will induce and oblige nations to settle their disputes without first cutting one another's throats.

A statement equally honorable to the statesman and the country he represented. In enlightened communities of the ancient world arbitration had been considered a means of ascertaining the justice of a dispute, and it was further recognized that

against one who offers to submit to justice you must not proceed as against a criminal until his cause has been heard.

But a desire to do justice in international as well as in private disputes presupposes not merely a reverence for law but a high degree of civilization, and therefore it is that arbitration in the ancient world was principally confined to the Greek communities.

The unfitness of war as the handmaid of justice is more evident in the concrete than in the abstract, and we therefore find, as has been happily said,

that the successive stages in the growth of arbitration synchronize with the termination of great and exhaustive wars.<sup>1</sup>

As war is seen to be disastrous to the many, although it may subserve the selfish purpose of a ruler not personally exposed to its dangers and who does not feel its effects, it follows that

its more general acceptance runs parallel with the decline of autocratic institutions and with the spread of freedom.<sup>2</sup>

As constitutional liberty is at once the creation and justification of English supremacy, we are prepared to accept the statement of a recent and careful writer that

its recognition as an important principle in the law of nations, as well as the framing of the rules which now govern its practice,

<sup>1</sup> Gennadius: *A Record of International Arbitration*, in *Broad Views* (1904), Vol. I, p. 396.

<sup>2</sup> *Ibid.*



are due almost exclusively to the two great branches of the Anglo-Saxon race. Their political genius, their aptitude in devising and in working free institutions, enable them to render to civilization services which are but the continuation of those benefits which the Greeks of old bestowed upon humanity.<sup>1</sup>

A young republic just emerging from a conflict in which its independence was recognized, with no traditions which fettered the hands of the statesman and forced a line of conduct inconsistent with its national interests, a form of government in which the people imposed upon its servants a policy in the interest of all rather than in the interest of the many or the few, a reverence for law as the firm basis upon which order and prosperity must inevitably rest, and the creation of machinery by which controversies between erstwhile sovereign states could sue and be sued in a court of justice for the ascertainment of the facts in a controversy and the application of a principle of law and justice for their solution, explain why the United States should accept the principle of arbitration and by practice raise it to the dignity of an institution.

It is essential, however, in a judicial proceeding that the suitor shall not be advocate and judge in his own cause, for, as the great Lord Stair has admirably said:

Kings and States ought not to be both judges and parties, where others can be had; but before they enter into war, they ought to demand satisfaction and give sufficient evidence of the fact, and not decline arbitration when an independent judge can be had.<sup>2</sup>

The policy of the United States has been not merely to proclaim arbitration but to make it a judicial proceeding; but the inherent difficulty has been and is to find "an independent judge" or judicial body to whom the nations of the world may

<sup>1</sup> Gennadius: *A Record of International Arbitration*, in *Broad Views* (1904), Vol. I, p. 396.

<sup>2</sup> Stair's *Vindication of Divine Perfections*, Mediation XIV (1695).

In another passage Stair writes: "If it were not for these provisions the whole Race of Mankind might become one Commonwealth, God having given an inbred Principle to Mankind to prefer the interest of the whole to that of any part." (*Vindication*, p. 252.) Quoted from Mackay's *Memoir of Sir James Dalrymple, 1st Viscount Stair*, p. 281, note 3.

be willing, in confidence and security, to submit a controversy for impartial and judicial decision.

## 7. EXAMPLES OF ARBITRATION—PRINCIPALLY AMERICAN

The importance of Jay's Treaty does not lie solely in the fact that it offers an example of arbitration between the English-speaking countries, or that it marks the beginning of an era of arbitration; it expressed the sober reason and mature conviction of our people that international difficulties not only could but should be settled by judicial and therefore peaceful means; it outlined the policy of this country in its foreign relations, and is but the beginning of a series of treaties by which the United States has sought to persuade foreign governments to settle judicially international public controversies which reasonable men would refer to established courts or to private arbitration for settlement. For example, in the very next year (October 27, 1795) the United States negotiated a treaty with Spain by the twenty-first article of which it is agreed to refer to the final decision of three commissioners "according to the merits of the several cases, and to justice, equity, and the laws of nations," claims growing out of the illegal capture of vessels by Spanish subjects during the late war between Spain and France. And in the year 1802 (August 11) a convention was signed by the United States and Spain

to adjust the claims which have arisen from the excesses committed during the late war, by individuals of either nation, contrary to the laws of nations or the treaty existing between the two countries,

by means of a board of commissioners, to consist of five members, two of whom should be appointed by each signatory and the fifth by the commissioners, or, should they fail to agree, to be drawn by lot.

It is no reflection upon the United States that the convention or treaty of 1802 was not carried into effect; it rather shows the difficulties often involved in arbitration. What arbitration failed to accomplish diplomacy effected, and by

the Treaty of February 22, 1819, the United States released Spain from liability for all claims of American citizens (Article IX) and assumed the obligation to satisfy them to the extent of five million dollars, in consideration of the cession of Florida to the United States.

Turning now to France, it appears that in the year 1803, (April 30) a convention was negotiated between the United States and France for the payment of various "debts" due by France to citizens of the United States, contracted before the thirtieth of September, 1800, arising for supplies embarked and prizes made at sea. In consideration of the cession of Louisiana, the United States assumed the payment of all such debts as should be established by a commission of three persons. Other and later claims were untouched by the convention. In other words, the United States assumed the payment of certain specified claims of its citizens in consideration of the cession of Louisiana, just as by the Treaty of 1819 with Spain the United States assumed the payment of claims of its citizens against Spain in exchange for the cession of Florida.

The claims, however, of American citizens against France for the unlawful seizure and confiscation of American property, other than those assumed by the United States in the convention of 1803, were many and various. The mutual claims and counter claims were a source of friction between the two countries. After much delay and negotiation, France agreed, by the Treaty of July 4, 1831, to pay to the United States "for unlawful seizures, captures, sequestrations, confiscations or destruction of their vessels, cargoes or other property," the sum of twenty-five million francs, to be distributed in such manner as the United States should deem proper (Article I), and the United States on its part paid the sum of one million, five hundred thousand francs in full settlement of claims of French citizens against the United States (Article III).

It has been said that the United States is a partisan of the judicial settlement of international disputes, and in further evidence of this, I call attention to the fact that for the settlement of the claims of American citizens against Spain and

France, the United States instituted commissions to which the various claims were presented, examined, and allowed or rejected. These were, however, purely domestic commissions, and are only international in so far as the claims presented to them were international in their origin.

Jay's Treaty was negotiated in a time of peace to prevent war. The various treaties with Spain and France were negotiated in peace without a fear of war. The next arbitration agreement (the Treaty of Ghent of December 24, 1814) to which the United States was a party was unfortunately at the conclusion of the war between Great Britain and the United States. It provided for the appointment of two commissioners, with eventual submission to a friendly Power in case of disagreement, to determine the ownership of certain islands in the Bay of Fundy (Article IV); for two commissioners to settle the northern boundary of Maine (Article V), and a commission likewise composed of two members to determine the northern boundary of the United States from a point in the 45° of north latitude through the Great Lakes to the Lake of the Woods (Articles VI and VII).

The next arbitration agreement (Convention of October 20, 1818) should be considered in connection with the Treaty of Ghent which provided in its first article that "any slaves or other private property" taken and carried away was to be restored to the party to which it belonged. As, however, Great Britain refused either to restore the slaves or to compensate the owners, Article V of the convention of 1818 agreed to refer the controversy to some friendly sovereign or State, in pursuance of which agreement the matter was referred to the Emperor of Russia as to the true construction of the first article of the Treaty of December 24, 1814. The Czar decided that the United States of America were entitled to a just indemnification, from Great Britain, for all private property carried away by the British forces; and as the question regards slaves more especially, for all such slaves carried away by the British forces. For the purpose of ascertaining the indemnity to which the United States was entitled under



the award of the Czar, the United States and Great Britain agreed in 1822 to appoint two commissioners and two arbitrators, with the curious provision that if the commissioners should disagree

they shall draw by lot the name of one of the two Arbitrators who, after having given due consideration to the matter contested, shall consult with the Commissioners; and a final decision shall be given, conformably to the opinion of the majority of the two Commissioners and of the Arbitrator so drawn by lot.<sup>1</sup>

It is scarcely necessary to state that the selection of the umpire by this method has failed to commend itself to partisans of arbitration. It is interesting, however, as showing how slowly, painfully and unwillingly nations have come to the conception that the umpire should be selected from a neutral and disinterested country.

It will not escape observation that these various treaties for arbitration were concluded upon the initiative of the United States during the period in which Europe was in the throes of the French Revolution, and had not succeeded in throwing off the yoke which the misguided genius of Napoleon had imposed. As arbitration brings forth its fruit in times of peace and as, wearied by war, men and nations see the advantage of a peaceful settlement, which decides the controversy without disturbing the rights of others, it is not strange that the allies relegated to arbitration certain matters, more detailed and intricate than they were important politically, and that the Congress of Vienna itself provided for the arbitration of certain matters, although this recognition of arbitration was not due to any belief in its inherent reasonableness, but, it would seem, to a desire to relieve diplomacy.

Arbitration was practically weak and untried, and unable to stand alone without the aid of diplomacy. There-

<sup>1</sup> Article V of the Convention of June 30-July 12, 1822, for indemnity under award of Emperor of Russia as to True Construction of First Article of Treaty of December 24, 1814.

fore, the conventions between France and Great Britain, of November 20, 1815, and of Austria, France, Great Britain, Prussia and Russia, of an even date, for the arbitration by commissions of the vast sums due by France as indemnity to the allied powers for causes arising out of the revolutionary war, failed completely. Arbitration had not proved itself a substitute for diplomacy, nor had it shown itself fitted to perform its tasks. Therefore, by conventions signed at Paris on April 25, 1818, France bound itself to pay to the allies in extinguishment of its obligations the immense sum of 371,250,000 francs, a reminder to the victim that the aftermath of war is almost as costly as war itself is destructive.

Arbitration has, however, to its credit the settlement by mixed commission of a controversy between France and Holland regarding the payment of arrears of interest from March to September of the year 1813.<sup>1</sup>

Leaving out of consideration the commission for the navigation of the Rhine (established by virtue of the regulations of March 24, 1815, and the decision of March 26, 1815,)<sup>2</sup> and the controversy between the Swiss cantons of Tessin and Uri (settled by an arbitral commission appointed by virtue of Article VI of the Congress of Vienna of March 20, 1815,)<sup>3</sup> we find a recognition of the principle of arbitration by the Congress of Vienna in the controversy of long standing concerning the possession of the duchy of Bouillon. It was, indeed, a matter of slight importance whether the duchy belonged of right to the house of Auvergne or to the Prince de Rohan; but the action of the Congress in submitting the dispute to five arbiters chosen respectively by the claimants on the one hand, and Austria, Prussia, and Sardinia on the other, was a recognition of the principle of arbitration by the Congress of Vienna which well deserves passing notice. Did these cases stand alone, they would have little claim to attention, but,

<sup>1</sup> De Lapradelle et Politis: *Recueil des Arbitrages Internationaux*, Vol. I, pp. 276-290.

<sup>2</sup> *Ibid.*, pp. 218-255.

<sup>3</sup> *Ibid.*, pp. 269-275.

as the beginning of arbitration on the continent, they have an interest beyond the immediate question involved.<sup>1</sup>

The first step had been taken and the regular order of things established by the Congress of Vienna, however artificially, and temporarily, gave Europe an era of repose. Arbitration had been tried by Great Britain and the United States and it justified the experiment, and little by little, especially after the period of 1830, Europe began to look with favor upon the settlement of disputes by arbitration which diplomacy had either failed, or was unwilling or unable, to settle. For example, France and Great Britain submitted to arbitration, under agreement of November 14, 1842, the so-called Portendic claims, arising from injuries sustained by British merchants in consequence of the absence of notification of the blockade of a portion of the coast of Morocco by France in its war of 1834-1835. The arbitration was of the Continental variety, for the question of liability was submitted to a disinterested sovereign, the King of Prussia, who found France legally liable for the damages sustained because of the lack of notification. To ascertain the indemnity, each litigant appointed a commissioner, and, to settle any difference of opinion between them, the King of Prussia designated an umpire. The damages assessed were trifling, less than forty-two thousand francs, but the case is important in the development of arbitral procedure. The principle is recognized that the question of liability should be determined by a stranger to the controversy; in so far the continental theory of arbitration is recognized and approved. The mixed commission is, however, employed to assess the damages arising from the illegal act of France, in the presence of an umpire likewise a stranger to the controversy. It needs no argument to prove that two arbitrations for a question of secondary importance are an expensive luxury; but the twofold recognition of the principle that the deciding vote should be neutral gives the arbitration an importance it would not otherwise possess.<sup>2</sup>

<sup>1</sup> De Lapradelle et Politis: *Recueil des Arbitrages Internationaux*, Vol. I, pp. 256-268.

<sup>2</sup> *Ibid.*, pp. 512-545

The service arbitration can perform is admirably illustrated by the case of Don Pacifico, a Jew of Gibraltar, who, roughly handled at the Easter celebration of 1847 in Athens, presented to the British Government a claim against Greece for over \$150,000. Lord Palmerston was a believer in a stiff foreign policy. He espoused the cause of Don Pacifico with imperfect knowledge, and raised it to the dignity of an international incident by using force against a country unable to defend itself. It is true that Don Pacifico's house was attacked and plundered by the mob; it may be that he would have had scant justice in the courts of the country, but an arbitral board composed of two members, with an umpire appointed by France, awarded the pitiful sum of £150. The case is not only an instance of arbitration but is a warning to the foreign offices. It is worthy of remark that the award of the commissioners was unanimous, notwithstanding the fact that the States in controversy were each represented by a commissioner.<sup>1</sup>

Three instances of arbitration deserve mention before passing to the Treaty of Washington of 1871 which gave to arbitration an international importance and significance which it never before possessed in the course of its entire history. The three instances referred to are the arbitration of the General Armstrong of 1851, the Anglo-American Mixed Commission of 1853, and the case of the Forte of 1863 between Brazil and Great Britain.

The facts and the award in the case of the General Armstrong are thus stated by Hall in his treatise on International Law:

In 1814 an American privateer, the General Armstrong, was found at anchor in Fayal harbour by an English squadron. A boat detachment from the latter approached the privateer and was fired upon. The next day one of the vessels of the squadron took up position near the General Armstrong to attack her. The crew, not finding themselves able to resist, abandoned and destroyed her. The United States alleged that the Portuguese governor had failed in his duty as a neutral, and demanded a large compensation for the owners of the privateer. After much

<sup>1</sup>De Lapradelle et Politis: *Recueil des Arbitrages Internationaux*, Vol. I, pp. 580-597.



correspondence the affair was submitted in 1851 to the arbitration of the President of the French Republic, who held that as Captain Reid, of the privateer, had not applied at the beginning to the neutral, but had used force to repel an improper aggression, of which he stated himself to be the object, he had himself disregarded the neutrality of the territory in which he was, and had consequently released its sovereign from all obligations to protect him otherwise than by his good offices; that from that moment the Portuguese government could not be responsible for the results of a collision which had taken place in contempt of its sovereign rights.<sup>1</sup>

As this is an American case, I have preferred to cite it from an English work of authority. For a like reason, I quote the criticism of a competent foreigner, M. Kleen, who declares the decision to be as wrong in its premises as in its conclusions; that if the reasoning of this award were approved in theory and consecrated in practice, it would be sufficient for a belligerent wishing to attack the enemy in neutral waters, to incite him, by a suspicious approach, to any act of legitimate defense, in order to make the neutrality of the port a vain word, and that the case of the General Armstrong should be considered not as a model to follow, but as a precedent to be disregarded.

Mr. Kleen's criticism seems well founded, and the conclusion he draws regarding the choice of sovereigns as arbiters is peculiarly pleasing to republican ears:

The Chief of a State, familiar with large horizons of general policy, is not the one to investigate minutely a special, narrow and subtle question of law. The criticism which the sentence of 1852 deserves, applies less to the arbiter than to the tradition, so long current, by virtue of which sovereigns were, in the first half of the nineteenth century, chosen to judge controversies, for which they lacked the necessary competence.<sup>2</sup>

The mixed commission of 1853 is only less important than the arbitration under the seventh article of Jay's Treaty. The

<sup>1</sup> W. E. Hall, *International Law*, 5th ed., pp. 624-625.

<sup>2</sup> De Lapradelle et Politis: *Recueil des Arbitrages Internationaux*, Vol. I, pp. 650-660. See also, Moore, *Int. Arb.*, II, 1071-1132. Elaborate references are given in Darby, p. 781.

preamble of the claims convention of 1853 states it as the opinion of the United States and Great Britain that "a speedy and equitable settlement" of the various outstanding claims arising since the Treaty of Ghent "will contribute much to the maintenance of the friendly feelings which subsist between the two countries." And for this purpose the countries in question established a commission to consist of two commissioners, of whom one should be appointed by each. A third person was to be chosen to act as arbitrator or umpire in case of disagreement, and should the commissioners be unable to agree upon the name of a third person, then each commissioner was to name a person

and in each and every case in which the commissioners may differ in opinion as to the decision which they ought to give, it shall be determined by lot which of the two persons so named shall be the Arbitrator or Umpire in that particular case. (Article I.)

The commissioners were fortunately able to agree upon Mr. Joshua Bates as umpire, an American by birth but a resident of England, who happily possessed the confidence of both Great Britain and the United States, and whose judgments, while less authoritative than those of Pinkney and Gore of Jay's commission, are entitled to great respect. In speaking of the commission, Professor Moore says:

For the peculiarly satisfactory results of the board's labors, credit was perhaps chiefly due to the Umpire—who exhibited in his decisions the same broad intelligence and sound judgment as had characterized his exceptionally successful career in business.<sup>1</sup>

"No case of Arbitration," according to a writer in the *North American Review*, "has ever been more successful than this. Damages were awarded in some thirty claims and many important decisions were pronounced by this Commission."

<sup>1</sup> John Bassett Moore, *American Diplomacy*, p. 209.

Mr. Seward remarked that it "had the prestige of complete and even felicitous success."<sup>1</sup>

The claims presented to the commission extended over many years and were varied in nature, and a number of important questions of international law were considered and decided by the commission. The most famous case was the *Creole* which at one time threatened to involve Great Britain and the United States in war. The facts are sufficiently stated in the brief head-note to the decision, as follows:

The *Creole* sailed from Hampton Roads, in Virginia, for New Orleans, with slaves on board. The slaves on the passage rose on the officers and crew, severely wounded the captain, the chief mate, and two of the crew, and murdered one of the passengers.

The mate was then compelled to navigate the vessel to the Bahamas. On her arrival she was taken possession of by the American consul, authority was restored, and measures were taken to send the vessel to the United States, in order that those slaves charged with mutiny and murder on the high seas might be tried. The British authorities interfered and liberated the slaves.<sup>2</sup>

In a much criticised opinion, from which the following extract is made, Mr. Bates said:

The *Creole* was on a voyage, sanctioned and protected by the laws of the United States, and by the law of nations. Her right to navigate the ocean could not be questioned, and as growing out of that right, the right to seek shelter or enter the ports of a friendly power in case of distress or any unavoidable necessity.

A vessel navigating the ocean carries with her the laws of her own country, so far as relates to the persons and property on board, and to a certain extent retains those rights even in the ports of the foreign nations she may visit. Now, this being the state of the law of nations, what were the duties of the authorities at Nassau in regard to the *Creole*? It is submitted the mutineers could not be tried by the courts of that island, the crime having been committed on the high seas. All that the

<sup>1</sup> See Darby, *International Tribunals*, p. 782, No. 35.

<sup>2</sup> Report of the Commission for the Settlement of Claims between the United States and Great Britain, pp. 241-245.

authorities could lawfully do was to comply with the request of the American consul, and keep the mutineers in custody until a conveyance could be found for sending them to the United States.

The other slaves, being perfectly quiet, and under the command of the captain and owners, and on board an American ship, the authorities should have seen that they were protected by the law of nations; their rights under which cannot be abrogated or varied, either by the emancipation act or any other act of the British Parliament.

Blackstone, 4th volume, speaking of the law of nations, states: "Whenever any question arises, which is properly the subject of its jurisdiction, such law is here adopted in its full extent by the common law."

The municipal law of England cannot authorize a magistrate to violate the law of nations by invading with an armed force the vessel of a friendly nation that has committed no offense, and forcibly dissolving the relations which by the laws of his country the captain is bound to preserve and enforce on board.<sup>1</sup>

The case of the *Forte* arose from the arrest and alleged illegal imprisonment of three British officers from the ship *La Forte*, at Rio de Janeiro, in 1862. The British naval officers were without the insignia of their rank, and Leopold, King of the Belgians, to whom the matter was referred, decided that

in the mode in which the law of Brazil had been applied toward the English officers, there was neither premeditation of offense nor offense to the British navy.

<sup>1</sup> Moore, *Int. Arb.*, Vol. IV, pp. 4377-4378.

Mr. Bates' opinion in the cases of the *Enterprise*, Commission for the Settlement of Claims between the United States and Great Britain, pp. 187 and following, and the *Hermosa*, *ibid.*, p. 238, likewise involving the question of slavery, have a rare human interest. The case of the *Florida*, *ibid.*, p. 246, and *Texas Bonds*, *ibid.*, p. 382 (Holford's case), the cases of the *John*, *ibid.*, p. 427, involving the capture of enemy property after a treaty of peace, and the *Washington*, holding the Bay of Fundy to be an open arm of the sea, *ibid.*, p. 170, are well reasoned authorities, and *McLeod's Case*, *ibid.*, p. 314, involving the assumption of the Government of the criminal act of its agent, is well known in international law.

For the work of the commission as a whole, see Moore's *International Arbitrations*, Vol. I, pp. 391-407; Vol. IV, pp. 4342, et seq. For the proceedings before the commission and a criticism of its results, see De Lapradelle et Politis: *Recueil des Arbitrages Internationaux*, Vol. I, pp. 661-762, especially pp. 705-732.



This case is important because nations, as their honor is supposed to be peculiarly involved, resent indignity to their military or naval representatives.<sup>1</sup>

As war is the result of conflict, so is it the cause of conflict and no uncertain source of arbitration either for the questions leading to war and unsettled by it, or for the questions to which it has given rise. The extension of international trade and commerce generates difference of opinion, and the conflict of interests between the native and the foreigner, in the desire of the one to maintain and the other to gain a market, often leads to discrimination either sanctioned by law or by a strained and artificial interpretation of existing law or treaties. Real or imagined discrimination results and the foreign office is burdened with the claims of subjects or citizens. When the necessity cannot be resisted to settle the controversies incident to war, the contracting parties are pressed by the claimants to include their grievances in the proposed treaty of arbitration, so that treaties at the end of war not only include the controversies arising from it, but are in the nature of a clearing house for international claims. The Civil War was no exception to this general rule, and the treaty of Washington, of May 8, 1871, between Great Britain and the United States, sought to include all outstanding difficulties in any way connected with the war and to determine finally other matters in dispute between the contracting parties. Irrespective of the magnitude of the questions submitted to arbitration, Professor Moore declares that

the right of this treaty to be regarded as the greatest treaty of arbitration the world has yet seen, was only emphasized by the fact that it provided for four distinct arbitrations, the largest number ever established under a single convention.<sup>2</sup>

The four questions for which arbitration was provided were

<sup>1</sup> La Fontaine, No. 47. For elaborate references to this case, see Darby's *International Tribunals*, p. 788.

<sup>2</sup> John Bassett Moore, *The United States and International Arbitration*, pp. 11-12, in the edition of the pamphlet published by the American Peace Society in 1906.

the Alabama claims,<sup>1</sup> the claims of British subjects and American citizens arising from alleged illegal acts of the contracting parties during the Civil War,<sup>2</sup> the compensation, if any, to be paid by the United States for the fishing privileges granted by Article 18 of the treaty,<sup>3</sup> the determination of the boundary line between the United States and the British possessions west of the Rocky Mountains under the first Article of the Treaty of June 15, 1846.<sup>4</sup>

The Geneva Award, in the so-called Alabama claims, is without question the most famous and most important case in the annals of international arbitration, and has done more than all other cases to advance the judicial and therefore peaceful settlement of international controversies.<sup>5</sup> It is frequently said that only cases of secondary interest are arbitrated which could not by any possibility cause war. The Geneva Award is a direct and conclusive refutation. It is also stated that questions involving "honor," whatever this indefinite phrase may mean, cannot be submitted to arbitration, but the honor of Great Britain and the United States were assuredly involved.

In simplest terms, the question submitted to arbitration by the treaty of Washington of May 8, 1871, between Great Britain and the United States, was, whether the acts of the Confederate cruisers of British origin, and the use of British ports as bases of operation taxed Great Britain with such a violation of neutral duty to the United States during the Civil War as to render Great Britain liable in damages.

For the guidance of the tribunal of arbitration, the treaty (Article VI), determined the law to be applied—the so-called three rules of the Treaty of Washington—and the tribunal,

<sup>1</sup> Treaty of Washington, May 8, 1871, between Great Britain and the United States, Articles I–XI.

<sup>2</sup> *Ibid.*, XII–XVII.

<sup>3</sup> *Ibid.*, Articles XVIII–XXV.

<sup>4</sup> *Ibid.*, Articles XXXIV–XLII.

<sup>5</sup> See Moore's *International Arbitrations*, Vol. I, pp. 495–682. Numerous references are given in Darby's *International Tribunals*, pp. 795–796.

composed of representatives of the United States, Great Britain, Italy, Switzerland and Brazil, examining the facts of each case in the light of the rules and such principles of international law not inconsistent therewith, awarded the United States the sum of \$15,500,000.

In view of all the circumstances of the case, Professor Moore is guilty of no exaggeration when he declares that the Geneva Arbitration offers

the noblest spectacle of modern times, in which two great and powerful nations, gaining in wisdom and self-control and losing nothing in patriotism or self-respect, taught the world that the magnitude of a controversy need not be a bar to its peaceful solution.<sup>1</sup>

If the origin of modern arbitration is to be found in Jay's Treaty of 1794, the Treaty of Washington of 1871 and the Geneva Award of 1872 mark at one and the same time its triumph and justification.

The second arbitration under the treaty dealt with all claims other than the Alabama claims "on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Her Britannic Majesty" and all corresponding claims of British subjects against the Government of the United States arising out of acts committed against the persons or property of their respective citizens and subjects during the period between April 13, 1861 and April 9, 1865, inclusive. For the settlement of these claims three commissioners were to be appointed in the following manner: one by the President of the United States, one by Her Britannic Majesty, and a third by the contracting parties conjointly and, in case of failure to agree, the third commissioner was to be named by the Spanish representative at Washington. The commissioners thus appointed were to make and subscribe before proceeding to any business, "a solemn declaration that they will impartially and carefully examine and decide,

<sup>1</sup> The United States and International Arbitration, p. 12 (edition of the pamphlet published by the American Peace Society).

to the best of their judgment, and according to justice and equity," all claims presented by the contracting parties.<sup>1</sup>

As may well be imagined from the jurisdiction of the commission, many and important claims were presented to the commission even although they had been passed upon by the Supreme Court of the United States, and the report of the proceedings of the commission is correspondingly valuable. The commission may be taken as the final type of the reconciliation between the mixed commission on the one hand and arbitration on the other, for while the contracting parties were represented in the commission, the umpire was selected by a stranger to the controversy.<sup>2</sup>

The third arbitration under the treaty to determine the compensation to be paid by the United States for the fishing privileges granted by Article 18, was to be by a mixed commission of three, selected as in the previous instance with the exception that the Austrian representative at London was to name the umpire.<sup>3</sup> However unsatisfactory the composition of the commission, or however galling its decisions may have been to the United States, the award was properly, if neither promptly nor graciously, paid.<sup>4</sup>

The fourth and last question specified in the treaty for arbitration, namely the ascertainment of the exact boundary line between Washington and British Columbia, was referred to the Emperor of Germany,<sup>5</sup> who accepted the trust and decided in favor of the United States.<sup>6</sup>

It should be said that within the same decade the United States negotiated treaties with Mexico (July 4, 1868), and

<sup>1</sup> Treaty of Washington, May 8, 1871, between Great Britain and the United States, Article XII.

<sup>2</sup> For proceedings of the Commission, see Moore's *International Arbitrations*, Vol. I, pp. 683-702; Vol. III, pp. 2201-2211; Vol. IV, pp. 3902-3958.

<sup>3</sup> Treaty of Washington, May 8, 1871, between Great Britain and the United States, Articles XXII and XXIII.

<sup>4</sup> Moore's *International Arbitrations*, Vol. I, pp. 703-753.

<sup>5</sup> *Ibid.*, Article XXXIV.

<sup>6</sup> Moore's *International Arbitrations*, Vol. I, pp. 196-236.



France (January 15, 1880,) for the settlement of outstanding difficulties arising from injuries to the persons or property of Mexican and American citizens, and the claims of French and American citizens "growing out of acts committed by the civil or military authorities of either country"<sup>1</sup> within certain defined limits. The Mexican convention is noteworthy not merely for the number of claims presented and rejected, but for the provision concerning the umpire. The commissioners were to name some third person

to act as an umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such third person, they shall each name one person, and in each and every case in which the commissioners may differ in opinion as to the decision which they ought to give, it shall be determined by lot which of the two persons so named shall be umpire in that particular case.<sup>2</sup>

Professor Francis Lieber of Columbia College, and upon his death Sir Edward Thornton, British Minister to the United States, were named. It is unnecessary to state that this method of appointing an umpire is opposed to principle and is neither sound in theory nor in practice.

The Franco-American mixed commission was composed of representatives of each of the contracting parties and a third commissioner appointed by the Emperor of Brazil.<sup>3</sup>

Passing over numerous arbitrations which have become more frequent with each decade—they could not be more important than the arbitrations under the Washington treaty—the convention of February 29, 1892, relating to fur-seals in Bering Sea, manifests anew the devotion of the English speaking race to the principle of arbitration. And the arbitration, important in itself, was enhanced by the powers conferred

<sup>1</sup> Claims Convention, January 15, 1880, between France and the United States, preamble.

<sup>2</sup> Claims Convention, July 4, 1868, between Mexico and the United States, Article I.

<sup>3</sup> Claims Convention, January 15, 1880, between France and the United States, Article I. For proceedings of the Commission, see Moore's *International Arbitrations*, Vol. II., pp. 1133–1184.

upon the tribunal to issue regulations for the protection of seal fishing in waters found to be beyond the jurisdiction of the respective governments.<sup>1</sup> In the institution of the tribunal of arbitration a long step was taken towards securing impartiality by admitting representatives appointed by three disinterested nations.

Two shall be named by the President of the United States; two shall be named by Her Britannic Majesty; His Excellency the President of the French Republic shall be jointly requested by the High Contracting Parties to name one; His Majesty the King of Italy shall be so requested to name one; and His Majesty the King of Sweden and Norway shall be so requested to name one. The seven Arbitrators to be so named shall be jurists of distinguished reputation in their respective countries; and the selected Powers shall be requested to choose, if possible, jurists who are acquainted with the English language.

Of the five points submitted to the tribunal, the most important in point of law was:

Has the United States any right, and if so, what right to protection or property in the fur-seals frequenting the islands in Behring Sea when such seals are found outside the ordinary three-mile limit?<sup>2</sup>

If the United States succeeded, as it did, to Russian rights in Alaska and Alaskan waters by purchase in 1867, still if the jurisdiction of the United States was limited to Alaska and the ordinary three-mile limit beyond low water mark, it necessarily followed that regulations issued by the United States assuming jurisdiction beyond that limit could only bind American citizens, but could not in anywise, without the consent of Great Britain, affect its subjects. The claim of the United States to jurisdiction beyond the three-mile limit, however unselfish it may have been and meant solely for the protection of seal fishing, was clearly contrary to international

<sup>1</sup> Convention Relating to Fur-Seals in Behring Sea, February 29, 1892, between Great Britain and the United States, Article VII.

<sup>2</sup> *Ibid.*, Article VI.

law, and the decision of the tribunal on this question, however disagreeable it may have been to the United States, was merely declaratory of the existing law of nations, that no nation in the absence of an international agreement can extend its jurisdiction beyond the three-mile limit in such a way as to affect citizens or subjects of foreign countries.<sup>1</sup>

It is thus seen that the policy of the United States has been from the foundation of the Republic favorable to international arbitration; that it has arbitrated questions involving disputed territory; that it has submitted to the determination of mixed commissions questions involving the legality of acts of its Government in times of peace as well as in war; that it has repeatedly referred to arbitration claims of its citizens against foreign countries, and that it has submitted, not merely the judgments of its courts but the propriety of jurisdiction exercised in virtue of legislative enactments to the decision of neutral sovereigns as arbitrators and commissions of arbitration in which the United States was represented. Not only has the United States arbitrated its own difficulties, but it has offered its good offices and mediation to foreign countries to secure arbitration, and in one celebrated instance went to the verge of propriety in insisting that a nation, not the meanest in reputation and power,—I refer to Great Britain,—should arbitrate its boundary dispute with Venezuela.<sup>2</sup> The parent listened to the mutterings of the child, and the dispute was arbitrated at Paris during the session of the First Hague Conference, which has set the seal of international approval upon arbitration as

the most efficacious and at the same time, the most equitable method of deciding controversies which have not been settled by diplomatic methods.

A recent and well-informed writer on international arbitra-

<sup>1</sup> For the Fur-Seal Arbitration, see Moore's *International Arbitrations*, Vol. I, pp. 755-961.

<sup>2</sup> Darby's *International Tribunals*, p. 828, No. 189.

tion<sup>1</sup> has analyzed the arbitrations of the past century and groups them as follows:

1. Those dealing with differences arising between States in their sovereign capacities:

- a* Boundary disputes on land;
- b* Fisheries.

2. Those dealing with matters in which one State makes a claim really on behalf of its subjects, but ostensibly in its sovereign capacity, against another State, on account of certain wrongful acts or omissions:

- a* Breaches of neutrality;
- b* Unlawful seizures;
- c* Violation of rights of person of foreign subjects.<sup>2</sup>

The brief survey of arbitration, principally chosen from American cases, contains illustrations under each heading of this classification, and thus outlines not merely some of the arbitrations to which the United States has been a party, but also indicates the variety and extent of arbitration.<sup>3</sup>

In considering the progress and development of arbitration since Jay's Treaty of 1794, the question naturally arises, is

<sup>1</sup> Phillipson, *Two Studies in International Law*, p. 43.

<sup>2</sup> This classification is a modified form of that suggested by M. Kamarowski in his *Tribunal International*, of which a French translation appeared in 1887.

Dr. Bulmerincq (in Holtzendorff's *Handbuch*, IV, 45, et seq.) thus classifies the arbitration cases that have occurred: 1. Ueber staatliches Eigenthum. 2. Ueber Staatsgrenzen. 3. Ueber Ausübung der Amtsgewalt staatlicher Autoritäten gegen Angehörige anderer Staaten. 4. Ueber Tödtung der Angehörigen anderer Staaten. 5. Ueber Beschlagnahme fremder Güter und Schiffe. 6. Ueber Verletzung und Nichtbeachtung der Pflichten der Neutralität. 7. Ueber Folgen einer nicht notificirten Blockade. 8. Ueber Interpretation eines internationalen Vertrages. 9. Ueber Rechtsverhältnisse zwischen einer halbsouveranen Macht und einer Compagnie.

<sup>3</sup> For an analysis of the subjects submitted to arbitration in the nineteenth century and an enumeration of the countries taking part in the proceedings, see Rivier's *Droit des Gens*, Vol. II, pp. 168-170.



there in the nature of things a limitation to the usefulness of arbitration and the questions which may properly be intrusted to arbitration? On this point I beg to invoke the authority of Professor Moore, so naturally and so constantly quoted on this subject.

When we consider the future of international arbitration, whether in America or elsewhere, we are at once confronted with the question as to its limitations. Is it possible to fix any precise bounds, beyond which this mode of settling international disputes may be said to be impracticable? If we consult the history of arbitrations during the past hundred years, we are obliged to answer that no such lines can be definitely drawn; but this is far from affirming that the use of force in the conduct of international affairs will soon be abolished. It signifies merely that phrases such as "national honor" and "national self-defense," which have been employed in describing supposed exceptions to the principles of arbitration, convey no definitive meaning. Questions of honor and of self-defense are, in international as in private relations, matters partly of circumstance and partly of opinion. When the United States, in 1863, first proposed that the differences that had arisen with Great Britain, as to the fitting out of the Alabama and other Confederate cruisers, should be submitted to arbitration, Earl Russell rejected the overture on the ground that the questions in controversy involved the honor of Her Majesty's Government, of which that government was declared to be "the sole guardian." Eight years later there was concluded at Washington the treaty under which the differences between the two governments were submitted to the judgment of the tribunal that met at Geneva. This remarkable example serves to illustrate the fact that the scope and progress of arbitration will depend, not so much upon special devices, or upon general declarations or descriptive exceptions, as upon the dispositions of nations, dispositions which, although they are subject to the modifying influence of public opinion, spring primarily from the national feelings, the national interests, and the national ambitions.<sup>1</sup>

The problem, therefore, is how to extend the scope of arbitration and to make it a regular and efficient means of settling peaceably disputes between nations which diplomacy has failed to settle. We are so accustomed to the settlement of private disputes in a court of justice that we forget that a time existed when each person determined his right by a resort to

<sup>1</sup> John Bassett Moore, *American Diplomacy*, pp. 221-222.

force, and that the law court on the one hand and private arbitration on the other, only became established when the judicial settlement of private controversies created an irresistible public opinion on their behalf. The judiciary is a triumph of reason over force and of education over prejudice, and we can only hope to win nations to the principle of arbitration by the creation of an enlightened international opinion so strong and convincing as to force nations to resort to arbitration. Peace societies of the United States and of Europe, international congresses of the friends of peace, the declarations and projects of scientific societies such as the Institute of International Law and the Association for the Codification of International Law, the Interparliamentary Union, the teaching of the pulpit and the instruction in our schools and colleges, and the invariable success of arbitration in the past century have created a public opinion which bids fair to carry everything before it. But in international life, the nation is the unit and the pressure must be brought upon the governments by public opinion, so that they may adopt arbitration for the settlement of disputes which diplomacy is either powerless to settle or which it has failed to adjust. It is natural, therefore, that the United States, in which public opinion not merely creates but dominates the Government, should have adopted arbitration as a cardinal principle of its foreign policy and that we should seek to extend the movement generated in our midst beyond our boundaries and to obtain the coöperation of Europe. The establishment of the Republic of the United States, the spirit of nationality generated by the French Revolution, the advantage of constitutional government over a despotism, and the desire of the European countries to establish constitutional forms of government in which the will of the people may be decisive, have rendered it comparatively easy for public opinion to find official expression. Europe, therefore, has taken up the cause of arbitration, and it is to be hoped that the sentiment in its favor, supported by a public opinion at home and imposed by international public opinion, will henceforward be the handmaid of justice and peace..

Without attempting to trace the movement to its origin or to treat the subject in detail, certain phases of the progress are too important to be overlooked. It is not enough that nations accept the principle of arbitration in the abstract, or that they arbitrate carefully selected cases of minor importance. It is essential that they bind themselves by international agreement to arbitrate either outstanding difficulties or preferably that they agree in advance to arbitrate, generally or specifically, future controversies as they arise. It is a matter of satisfaction that the United States has been a pioneer in the movement toward arbitration, and it is peculiarly appropriate that William Jay, the worthy son of the Father of Modern Arbitration, pointed out the method which nations have accepted and made their own. For example, in a little work published in England and in the United States in 1842 and which has had great influence at home and abroad, Mr. Jay proposed that an arbitration clause, with which we are fortunately so familiar, should be introduced in future treaties. As the matter is so important, I quote the following passages from his pamphlet: *War and Peace: The Evils of the First and a Plan for Preserving the Last*:

Of all the nations with whom we have relations, none, perhaps, enjoys in an equal degree our good-will as our first and ancient ally. Between us and France no rivalry exists in commerce and manufactures; and we perceive at present no prospect of an interruption of that harmony which has so long marked the intercourse of the two nations.

Suppose in our next treaty with France an article were inserted of the following import: "It is agreed between the contracting parties that if, unhappily, any controversy shall hereafter arise between them in respect to the true meaning and intention of any stipulation in this present treaty, or in respect to any other subject, which controversy cannot be satisfactorily adjusted by negotiation, neither party shall resort to hostilities against the other; but the matter in dispute, shall, by a special convention, be submitted to the arbitrament of one or more friendly powers; and the parties hereby agree to abide by the award which may be given in pursuance of such submission."<sup>1</sup>

<sup>1</sup> *War and Peace*, (English Edition), p. 40.

And it seems little more than poetic justice that our first modern treaty containing the arbitration clause, ratified by the Senate and proclaimed by the President, should have been concluded with "our first and ancient ally," France.<sup>1</sup> Jay's recommendation did not fall upon deaf ears, and, while it cannot be said that he created public opinion in behalf of arbitration, it is not too much to assert that he gave it a positive concrete direction. Within six years after the publication of his little book, the United States inserted in its treaty with Mexico the following clause:

If unhappily any disagreement should hereafter arise between the Governments of the two Republics, whether with respect to the interpretation of any stipulation in this treaty, or with respect to any other particular concerning the political or commercial relations of the two nations, the said Governments, in the name of those nations, do promise to each other that they will endeavor, in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves, using, for this end, mutual representations and pacific negotiations. And if, by these means, they should not be enabled to come to an agreement, a resort shall not, on this account, be had to reprisals, aggression, or hostility of any kind, by the one republic against the other, until the Government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighborhood, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case. (Article XXI.)

The Peace Society of England made the proposal its own and in 1849, Richard Cobden made the following motion in the British House of Commons:

That a humble address be presented to Her Majesty, praying that she will be graciously pleased to direct her principal Secretary of State for Foreign Affairs to enter into communication with Foreign Powers, inviting them to concur in treaties,

<sup>1</sup> Arbitration convention between the United States and France, concluded February 10, 1908.



binding the respective parties, in the event of any future misunderstanding, which cannot be arranged by amicable negotiation, to refer the matter indispute to the decision of arbitrators.<sup>1</sup>

Defeated at the time, Cobden's successor, Mr. Henry Richard, was able to secure the adoption of the following motion by the House of Commons in 1873:

Resolved that an humble Address be presented to Her Majesty, praying that She will be graciously pleased to instruct Her Principal Secretary of State for Foreign Affairs to enter into communication with Foreign Powers with a view to further improvement in International Law and the establishment of a general and permanent system of International Arbitration.<sup>2</sup>

Encouraged by this initial success, the distinguished Italian publicist and statesman Mancini introduced the following motion, which was adopted unanimously by the Chamber of Deputies:

The chamber expresses a wish that the Government of the King in its foreign relations endeavor to make arbitration an accepted and frequent means of settling in accordance with justice international disputes in matters susceptible of arbitration; that it propose, whenever the opportunity offers, to introduce into the treaties a clause stating that difficulties over the interpretation and enforcement of said treaties shall be referred to arbitrators; and that it persevere in the excellent initiative taken by it for some years towards the conclusion of conventions between Italy and the other Powers with a view to making the essential rules of private international law uniform and obligatory in the interest of the respective peoples.<sup>3</sup>

Other nations followed the good example set by the United States, Great Britain and Italy, so that year by year the world is being surrounded by a network of international treaties for the arbitration of international controversies. The triumph of arbitration is assured. But to be a permanent means of settling international disputes, arbitration must be efficacious. Is it efficacious? To this question, Professor Moore responds:

<sup>1</sup> Cobden's Speeches, edited by Bright and Rogers, Vol. II, pp. 384-398.

<sup>2</sup> Hansard's Parliamentary Debates, 1873, Vol. CCXVII, pp. 52-87.

<sup>3</sup> *Revue de droit international et de législation comparée*, 1874, Vol. VI, pp. 172-173.

The best answer we can make to that inquiry is to ask the objector to point to a single instance in which two nations, after having agreed to arbitrate a difference, have gone to war about it. Arbitration has brought peace, and "peace with honor." It is a rude and savage notion that nations, when they feel themselves aggrieved, must, instead of discussing and reasoning about their differences in a spirit of patience and forbearance, seek to avenge their wrongs by summary and violent measures. Among an enlightened and Christian people the spirit of revenge, discarded, as it is, in laws for the government of men in their private relations, can still less be adopted as a principle of public conduct. For, just in proportion as the responsibilities of nations are greater and more solemn than those of private individuals, in that proportion are nations bound to exceed the measure of private virtue in their efforts to hasten the era of peace.<sup>1</sup>

In laying the corner-stone of the building for the International Union of American Republics, Mr. Root, speaking as Secretary of State, said:

There are no international controversies so serious that they can not be settled peaceably if both parties really desire peaceable settlement, while there are few causes of dispute so trifling that they cannot be made the occasion of war if either party really desires war. The matters in dispute between nations are nothing; the spirit which deals with them is everything.<sup>2</sup>

<sup>1</sup> The United States and International Arbitration, Annual Report of the American Historical Association (1891), pp. 65, 85.

<sup>2</sup> American Journal of International Law, (1908) Vol. II, p. 624.

## CHAPTER VI

### THE CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES OF 1899 AND ITS REVISION IN 1907

There are various ways in which the results of the two Hague Conferences may be described: First, the historical method, giving the origin of each proposition and the steps by which it became incorporated into the conventions as finally adopted; second, by means of a commentary upon the conventions, article by article, in order that the nature of each may be considered, its scope determined and its meaning ascertained; third, by a survey of the convention as a whole and by its separation into its constituent parts the underlying purpose may be discovered and expounded in general rather than in detail, and by analysis of important provisions a philosophical survey be presented. The third method, analytical and philosophical in its nature rather than historical and detailed, is the one adopted for the presentation of the positive results of the conferences, with an occasional reference to the projects as originally presented, so that the historical setting may be supplied when it seems necessary to a correct understanding of the subject.

The Convention for the Peaceful Settlement of International Disputes was, as has already been said, the great and crowning glory of the First Conference. Its revision by the Second Conference in the light of practical experience and theoretical discussion has made the original project more worthy of the commendation lavished upon it. The spirit of the Convention of 1899 remains intact; various details suggested by practice have been incorporated; the procedure of the First Conference has been elaborated carefully and conscientiously by the Second Conference, in order to render the provisions of the Convention more adequate and therefore more far-reach-

ing. An examination of the Convention of 1899 shows that it consisted of four titles, devoted respectively to: The Maintenance of General Peace, Good Offices and Mediation, International Commissions of Inquiry; International Arbitration. The latter title is divided into three chapters, concerning arbitration in general; the Permanent Court of Arbitration, for the settlement of questions susceptible of judicial treatment, and arbitral procedure for the presentation and conduct of a case in the Court of Arbitration established in accordance with the provisions of the Convention.

It will be recalled that Article 8 of the second Russian Circular stated that

the subjects to be submitted for international discussion at the Conference could in general terms be summarized as follows: to accept in principle the employment of good offices, of mediation and facultative arbitration in cases lending themselves thereto, with the object of preventing armed conflicts between nations; to come to an understanding with respect to the mode of applying these good offices, and to establish a uniform practice in using them.

An analysis of the Convention of 1899 shows that each recommendation of the circular was incorporated into the Convention and that appropriate machinery was created in order to give form and effect to the recommendations. The Conference went beyond the letter of the program but not beyond its spirit in creating a permanent court in which arbitration, recognized by Article 8 of the program, could be had of questions susceptible of judicial treatment presented to it for adjudication. The first Russian Circular stated the purpose in the opening sentence to be the maintenance of general peace as the ideal toward which the endeavors of all governments should be directed,

and the concluding paragraph of the circular expressed the hope that the Conference would confirm the agreements reached by the delegates

by the solemn establishment of the principles of justice and right, upon which repose the security of States and the welfare of peoples.



The preamble of the Convention of 1899 embodies the hopes and aspirations expressed in the two circulars in a form which, when stated, requires little comment and no addition. It declares the Powers to be

Animated by a strong desire to concert for the maintenance of the general peace;

Resolved to second by their best efforts the friendly settlement of international disputes;

Recognizing the solidarity which unites the members of the society of civilized nations;

Desirous of extending the empire of law, and of strengthening the appreciation of international justice;

Convinced that the permanent institution of a Court of Arbitration, accessible to all, in the midst of the independent Powers, will contribute effectively to this result;

Having regard to the advantages attending the general and regular organization of arbitral procedure;

Sharing the opinion of the august Initiator of the International Peace Conference that it is expedient to solemnly establish, by an international Agreement, the principles of equity and right on which repose the security of States and the welfare of peoples.

## 1. GOOD OFFICES AND MEDIATION

The first title of the Convention is properly headed "The Maintenance of General Peace," thus setting forth clearly in the first article the idea underlying the call of the Conference; for the powers agree to use their best efforts to insure the pacific settlement of international differences with a view to obviate, as far as possible, recourse to force in the relations between States. The preamble and the first title may, therefore, be taken as expressing in happy and terse form the key-note of the Convention, namely, the maintenance of general peace, and, in order to maintain this general peace, the Signatory Powers agree to have recourse, as far as circumstances will allow, to the good offices or mediation of one or more friendly Powers (Article 2); that strangers to the controversy should, on their own initiative, as far as circumstances permit, offer their good offices and mediation to States at variance; that this offer may be made even during the course of hostilities, and that the exercise of this

right shall never be regarded by one or the other of the parties to the contest as an unfriendly act (Article 3); that the rôle of the mediator consists in reconciling opposing claims and in appeasing feelings of resentment (Article 4); that the functions of the mediator are at an end when either of the parties to the dispute, or indeed the mediating power, declares that the methods of conciliation are not accepted (Article 5); that good offices and mediation have exclusively the character of advice (Article 6); that the acceptance of mediation before war can not, in the absence of agreement to the contrary, have the effect of interrupting, delaying or hindering mobilization or other methods of preparation for war, and that, if mediation occurs after the commencement of hostilities, it causes no interruption to the military operations in progress unless there be an agreement to the contrary (Article 7). It thus appears from the exact language of the convention that the offer of good offices and mediation results from agreement of the parties in controversy; that it is a friendly act undertaken solely in the interest of preserving peace or of bringing about peace if war actually exists; that it has no effect either upon the preparation for or conduct of war; that it has no more influence than a word of advice from friend to friend; and that, if disagreeable or unacceptable to the power, the offer shall be withdrawn.

Powers are not more prone than individuals in controversy to listen to friendly advice, and they are accustomed to resent intermeddling. Between nation and nation the fear that the exercise of good offices and mediation may become a precedent and insensibly pass into a claim of intervention inconsistent with independence and its corollary, equality, has doubtless prevented an offer on more than one occasion, and the consequences of the "Holy Alliance" were not such as to incline nations to sanction by international agreement the exercise of a right which might interfere with the full and untrammelled exercise of sovereignty.<sup>1</sup> If, however, the

<sup>1</sup> See Nys: *Le Concert Européen et la notion du Droit International* in his *Études de Droit International et de Droit Politique*, 2d series, pp. 1-46.

exercise of the offer of good offices and mediation be purely voluntary, and be not raised to the rank of a duty of strangers to decide the controversy, and if the effect of good offices and mediation be restricted to advice which may be accepted or rejected by either of the parties to the conflict, it is difficult to see how the offer, although it may be embarrassing, can prejudice the freedom of action of the contending parties.

The question should, however, be viewed in its broader aspects, because the outbreak of hostilities, while it concerns primarily belligerents, is not without interest to neutrals, which find themselves affected and seriously prejudiced by a state of warfare; for that which was permitted to their citizens or subjects in time of peace is no longer allowed in time of war.

For example, trading in certain commodities, falling within the definition of contraband, subjects not only the articles but also the vessels in which they are carried to capture and confiscation, and trading with blockaded ports is strictly prohibited. The neutral, therefore, is not a disinterested spectator; he feels the consequences of the war, although the full evil does not affect him, and in seeking to avoid war and its consequences he acts not merely in the interest of the belligerents, but as a neutral seeking to save the rights of neutrals.

The interest of the neutral in warfare is recognized by the third convention of the Second Conference, which provides that a neutral should not be taxed with notice of the war and the performance of neutral duties until it has received notification of the existence of war. If war, then, has the effect of imposing duties upon the neutral which do not exist in time of peace, it follows that it must be in the interest of enlightened as well as selfish neutrality to preserve peace in order to avoid neutral duties, and if war already exists, it must likewise be the neutral's interest to bring about a cessation of hostilities irksome to neutral activity. The neutral should not be taxed as a mere meddler because, in seeking to prevent the outbreak of war, he is actuated by motives of self-interest of a

legitimate nature, as well as a large and philanthropic desire to preserve the world from the horrors of war.

Suppose that a difference of opinion exists and threatens to become acute between two members of the family of nations, what steps are taken, and in what order, to remove the misunderstanding, to adjust the difficulty and to redress the injury if one really exists? Let Professor Moore answer the question:

The ordinary mode of obtaining international redress is by diplomatic negotiation. There is nothing that so much conduces to the adjustment of differences as a full and frank discussion of them. Usually, negotiations are conducted by the regular official representatives of the governments concerned. Where, however, the exigencies or magnitude of the controversy appear to render it expedient, special or additional representatives, official or unofficial, are employed; and, where the occasion requires it, formal international conferences are held. Of such conferences the history of diplomacy affords many examples.

Where negotiation fails, the parties may try the good offices or mediation of a friendly power, or may resort to arbitration.<sup>1</sup>

With negotiation, as such, we have nothing to do, for the convention under examination speaks only of good offices, mediation and arbitration. The convention draws no distinction between "good offices" and "mediation." They are considered as identical expressions, denoting, it may be, a greater degree of intensity. As diplomacy has never insisted upon the distinction, and considers the terms as synonymous, the framers of the Convention of 1899 were wise to accept the terms as generally used and understood without attempting a distinction which at best is formal rather than real. It may be that an offer of good offices is a word of advice to settle a dispute without a resort to war, and that the term "mediation" properly denotes coöperation in the actual settlement of the controversy.

The essence of good offices consists in advice to parties in controversy to settle their difficulties. It precedes and calls into being negotiation, and when this is done good offices as such are

<sup>1</sup> Moore, *Int. Law Dig.*, Vol. VII, § 1064, p. 2.



exhausted. Mediation assumes charge of the negotiation between the parties, and by impartial and friendly counsel suggests, but does not impose, a solution. As Sir James Mackintosh happily says:

A mediator is a common friend, who counsels both parties with a weight proportioned to their belief in his integrity and their respect for his power. But he is not an arbitrator, to whose decisions they submit their differences, and whose award is binding on them.<sup>1</sup>

In a word, good offices begin and end in counsel; mediation, if successful, suggests a concrete settlement; arbitration decides a controversy according to principles of law. Good offices and mediation are a diplomatic; arbitration a judicial, proceeding.

The difference between good offices and mediation is, after all, one of degree, not of kind, and as the section is entitled "Good Offices and Mediation," and as the phrases are used in conjunction, no ambiguity can arise even although there seems to be more than a shade of difference between the two terms. However this may be, the terms are well recognized and understood in international law, and the Conference in adopting them and sanctioning the idea underlying them, raised "good offices" and "mediation" to the rank of an international right, and therefore a duty, which, existing in theory, is but little known in international practice.

The Congress of Paris of 1856, which began the codification of international law with the admirable declaration concerning maritime warfare, previously quoted, has another and greater claim upon our gratitude, by recommending and adopting in conventional form, mediation "before having recourse to the use of force." The recommendation of the Congress of Paris was special and general; special in that the contracting Powers agreed to mediation between themselves (Article VIII), and general in that the Congress recommended generally a recourse to good offices before a resort to arms. This distinction appears

<sup>1</sup> Hansard's Parliamentary Debates, Vol. XXX, 526, April 11, 1815; Moore, Int. Law Digest, Vol. VII, § 1064, p. 3.

clearly in the wording of the articles, which, in view of the importance of the subject, should be given:

If there should arise between the Sublime Porte and one or more of the other signing Powers, any misunderstanding which might endanger the maintenance of their relations, the Sublime Porte and each of such Powers before having recourse to the use of force, shall afford the other Contracting Parties the opportunity of preventing such an extremity by means of their mediation. (Article VIII.)

The twenty-third protocol of the treaty, due to the efforts of Henry Richard, Joseph Sturge and their devoted followers, is, as previously stated, more general:

The Plenipotentiaries do not hesitate to express, in the name of their Governments, the wish that States between which any serious misunderstanding may arise, should, before appealing to arms, have recourse, as far as circumstances might allow, to the good offices of a friendly Power.

The Plenipotentiaries hope that the Governments not represented at the Congress will unite in the sentiment which has inspired the wish recorded in the present Protocol.<sup>1</sup>

Article XII of the General Act of the Congo Conference, signed at Berlin, February 26, 1885, recognized and enforced mediation in the case of a serious disagreement between parties to the General Act regarding the Congo territory.

These Powers pledge themselves, before appealing to arms, to have recourse to the mediation of one or more friendly Powers.

The doctrine recognized and proclaimed by the Congress of Paris was thus repeated in international agreements of great importance. But it will be noted that the contracting parties agree to resort to good offices or mediation, or to permit the contracting powers to offer good offices or mediation, but it is not made the duty of the neutral to intervene. The great importance of the present convention lies in the fact that the contracting powers not only bind themselves to resort to good offices and mediation, but that they recognize the usefulness,

<sup>1</sup> For the French text and further instances, see M. Descamps' *Relevé Général des Clauses de Médiation et d'Arbitrage, Conférence Internationale de la Paix*, 1899, part I, pp. 138-141.

the desirability and the right of strangers to the controversy to proffer good offices and mediation for the settlement of serious disagreement or conflict between the contracting parties.

So far, good offices and mediation have been considered as extended to states in controversy on the initiative of strangers to the dispute. The First Conference, however, on the initiative of Mr. Holls, devised a system of mediation which involves the coöperation of powers in controversy. For example, the States at variance shall each choose a power to which they entrust the mission of entering into direct communication with the power chosen on the other side, with the object of preventing the rupture of pacific relations. These two powers are regarded as the direct representatives of the States in controversy, just as seconds in a duel represent their principals, and are entrusted during a period of thirty days with the delicate mission of settling peaceably the difficulty without interference from the principals. If, however, the difficulty can not be arranged honorably, and war breaks out, the designated powers remain charged with the joint duty of taking advantage of every opportunity to restore peace. (Article 8.) In this way, by happy intuition, machinery is created of a permanent nature. The two seconds, to pursue the analogy of the dueling code, enjoy the confidence of their principals, and by virtue of the appointment, are charged with a duty to suggest a termination of the controversy if it may be terminated without dishonor to the principals. The influence and importance of this provision are still theoretical and problematical, for it has not yet been applied. If prospective or actual belligerents regard the good offices of neutrals as meddlesome, parties willing to settle a difficulty may, by seconds or negotiators of their own choice, enter into confidential relations which, with tact and great prudence, may prevent or terminate war.<sup>1</sup>

<sup>1</sup> On returning home after dinner, I found a cipher despatch from the Secretary of State informing us that President McKinley thinks that our American commission ought not to urge any proposal for "seconding

Mr. Holls, the author of the special form of mediation, does not claim that the idea was in any sense original, but whether original or not, it was due to his initiative and energy that it was presented to the Conference, and found its appropriate place in Article 8 of the First Convention. In his work on the Peace Conference, Mr. Holls states the origin and nature of the article in the following manner:

At the second session of the Comté d'Examen, May 29, the first draft of this Article was introduced by Mr. Holls of the United States, as a personal proposition, for which neither his Government nor his colleagues were in any manner responsible. No claim, whatever, is made for originality of the idea, which the author remembers to have seen made as a suggestion, years ago, in a source of which no trace whatever has been left in his recollection. More recently the idea was formulated with great force by M. de Nelidoff, the Russian Ambassador to Italy, as follows:

"The first consideration is not to insist upon the parties submitting their dispute to the judgment of a tribunal—possibly impartial, but cold and indifferent, and moved only by the most general considerations regarding the interests or the honor of the parties themselves. What should be done is to insist that, before beginning hostilities, the contending parties should intrust the settlement of the affair to representatives in whom they can have absolute confidence: who will act according to instructions, and who will each defend the honor of his principal as he would his own. Everything should then be left to these seconds. They should first decide whether the quarrel necessitates a duel,—then they should see whether no honorable means could be found to avoid an encounter. If they could not agree on this subject, they might call in a third party, or communicate their suggestions to their principals. But the final determina-

powers;" that he fears lest it may block the way of the arbitration proposals. This shows that imperfect reports have reached the President and his cabinet. The fact is that the proposal of "seconding powers" was warmly welcomed by the subcommittee when it was presented; that the members very generally telegraphed home to their governments, and at once received orders to support it; that it was passed by a unanimous vote of the subcommittee; and that its strongest advocates were the men who are most in favor of an arbitration plan. So far from injuring the prospects of arbitration, it has increased them; it is very generally spoken of as a victory for our delegation, and has increased respect for our country, and for anything we may hereafter present.—Andrew D. White's Autobiography, Vol. II, p. 285.



tion should always be left to the interested parties. If in the end the seconds decided that there was nothing to do but to have them 'fight it out,' they would do so. But if they resorted to arms without having had recourse to these preventive preliminaries, and a catastrophe resulted, the winner should be treated, not as a duelist, but as an assassin. This should also be the rule in the case of an international war."

In the winter after the appearance of the second circular of Count Mouravieff, the late Lord Russell of Killowen, Lord Chief Justice of Great Britain, strongly recommended the same idea in a most happy after-dinner speech. It had been discussed by the author with intimate friends in America just previous to his departure for The Hague, and its introduction had the cordial indorsement of Ambassador White, President of the American Commission.

Upon its introduction, the Article was revised, as far as its language was concerned, by M. de Martens and Chevalier Descamps, and it was printed, distributed, and reported to the principal European Governments immediately. At the third session of the *Comté d'Examen* on May 31, it was unanimously adopted in principle, and thereafter it was put into its present final form.<sup>1</sup>

The title of the First Convention dealing with good offices and mediation does not create a legal obligation either on the part of the States to offer good offices and mediation, or on the part of the States in controversy to accept good offices, or finally, on the part of such States to request strangers to the controversy to extend their good offices and mediation. The procedure is entirely voluntary, and the obligation, if any, is moral. States are, however, not to be considered as intermeddling, if they endeavor, honorably and honestly, to prevent a controversy from assuming warlike proportions, nor are they to be taxed as meddlers by an expression of their desire to terminate an existing war by settling the controversy which has caused a resort to arms. The articles, however simple and ineffective they may seem to be, nevertheless offer an additional means of preserving or bringing about peace; for they create between ordinary diplomatic negotiations between

<sup>1</sup> Holls' Peace Conference, pp. 188-189. In pages 190, et seq., Mr. Holls presses the analogy between warfare and dueling, and outlines the procedure under his article as well as its practical value.

the parties in controversy and the war which may result from unsuccessful negotiations, a procedure by means of which the resort to arms may be averted, or peace restored if war actually exists. It will be noted that the nature of the controversy in which good offices and mediation may properly be offered, is not specified by the Convention; therefore all controversies, whether they be political or judicial, and whether they involve a mere question of fact, or whether they touch the independence, vital interests, or honor of the contending nations, may be the subject of good offices and mediation.

The termination of the Russo-Japanese War in 1905, due to the initiative of President Roosevelt, shows the beneficent effect of good offices; and the action of France in proposing an international commission of inquiry for the settlement of the controversy arising out of the Dogger Bank incident of 1904, between Great Britain and Russia, shows the pacific possibilities of mediation, when honestly undertaken and directed solely in the interest of the contending parties, for the establishment of peace and the prevention of war.<sup>1</sup>

## 2. INTERNATIONAL COMMISSION OF ENQUIRY

A controversy, however acute, may rest upon a disputed fact and the ascertainment of this fact would in such a case settle the dispute. A nation claims of right to exercise jurisdiction over a certain region, and a neighboring nation asserts jurisdiction over the land in question. Each claims exclusive jurisdiction, and each is unwilling to yield to the other. If some machinery can be established to ascertain the exact boundary, the question of jurisdiction is settled, because it is by virtue of the boundary that each nation claims jurisdiction. The ascertainment of the fact thus decides the controversy. But the value of the finding must depend upon the care and accuracy with which it is made, and it would, therefore, seem that a commission charged with the sifting of the evi-

<sup>1</sup> For good offices and mediation to which the United States has been a party, see Moore's *Dig. Int. Law*, Vol. VII, § 1065-1068, pp. 2-22.

dence and the establishment of the fact should be international. The recourse to the commission may well be voluntary, because experience shows that people are often more willing to resort to a means of their own choosing than to be forced to adopt a particular means, even although the result accomplished be identical. In moments of excitement we are apt to feel the restraint of an imposed duty, but we are not unwilling to resort to a means voluntarily, if by so doing we may escape grave consequences. These views were evidently shared by the First Peace Conference, and the commissions of inquiry provided for by Title 3 (Articles 9-14) are international, and the resort to them is within the sound discretion of the parties to a controversy. The commission of inquiry is looked upon as a last resort, and presupposes inability to come to agreement by diplomatic methods. By abundance of caution, differences involving honor and vital interests would seem to be excluded, but it is evident that independent sovereign nations may submit, if they so desire, differences involving both honor and vital interests. The seeming exception is undoubtedly due to the fact that the mere existence of the commission of inquiry shall not seem to require a submission of differences involving honor and vital interests, and the voluntary character of the institution is still further safeguarded by the agreement to submit "as far as circumstances allow." The powers in controversy are the judges of the question whether the facts involve honor or vital interests, or whether the peculiar circumstances of the case permit a submission of the differences in question. (Article 9.)

In the next place, the commission of inquiry is to be constituted by special agreement of the parties, and the agreement to submit shall specify the facts to be examined, and the extent of the power of the commissioners. In this way, not only are the contending parties sole judges whether the difficulty should be submitted, but they likewise control the composition of the tribunal to which the agreed statement of the controversy shall be submitted. (Article 10.)

It follows naturally that a submission involves the duty to

supply as fully as possible all means and facilities necessary to enable the commission to arrive at a complete knowledge and a correct understanding of the facts in dispute. (Article 12.)

And, finally, the facts as found are to be reported by the commission to the parties in controversy for their information and for such use as they may care to make of the facts as found by the commission. (Articles 13 and 14.)

It is thus seen, that the entire proceeding is voluntary, for the nations do not bind themselves to submit a question in controversy to a tribunal. The constitution of the commission depends upon the agreement of the parties. It is, therefore, a voluntary tribunal, and the parties to the controversy are left entire liberty to give effect to the facts as found by the commission or tribunal of their own choice. The differences of opinion regarding the effect of the fact as found upon the liability of either party are in no ways concerned; for the parties may arrange the difficulty by diplomatic negotiations, or, if they choose, they may submit the question of responsibility to arbitration. Of the proceedings to be taken, they are the sole competent judges. It can not be denied, however, that the mere ascertainment of the fact goes far in itself to establish responsibility, and a direct, although moral pressure, is thus brought upon the parties to settle the difficulty in accordance with the fact found. It can not be said that the creators of the institution worked wholly in the dark, because they created a practical institution based upon actual experience; but they were naturally unable to predict in advance the success of the institution created by them. When, therefore, the Russian squadron under Admiral Rojetsvensky, on its way to the Pacific, fired into an English fishing fleet off Dogger Bank, in the belief that it was composed of Japanese cruisers, or that Japanese vessels lurked among it, an expectant world looked forward, with no little curiosity, to the commission of inquiry, charged with ascertaining the facts of the case. The award of the tribunal, which, by special agreement of Great Britain and Russia, was invested with the power to ascertain the facts and fix the responsibility, was, therefore,



no common event, and the acceptance of the award and the payment of damages arising from the responsibility as found, showed that the First Peace Conference had created a practical and efficient means of ascertaining facts in a heated controversy, and preventing a resort to arms, which, in the inflamed state of public feeling, might have occurred.<sup>1</sup> The tribunal thus justified its creation, and it can not be doubted that its existence in the year 1898 would have brought pressure upon Spain and the United States to submit the question of the Maine to an international commission of inquiry, in order that the facts be established by means of an impartial, that is to say, international, and conscientious investigation. It can not be said that the explosion of the Maine was the direct or proximate cause of the war with Spain; but the elimination of the incident might have prompted the two nations to adjust their other difficulties without an appeal to the sword.

The Commission of Inquiry of 1899 provided that the agreement between the parties should fix the procedure, and that the procedure to be observed, if not provided for in the convention, should be fixed by the commission. (Article 10.) These provisions were intended to leave the procedure to the determination of the parties in controversy; but it is evident that, if parties in controversy are not in a frame of mind to ascertain, judicially and impartially, disputed facts, it would seem to follow that they may not be in a condition to draw up rules of procedure to elucidate the questions in controversy. The great advantage of a commission of inquiry is that it ascertains, as speedily as possible, facts submitted to it, in order that public feeling may become informed of the true state of affairs. To perform its duty quickly and successfully, a code of procedure should be known, so that attorneys and counsel of the parties in conflict, as well as the commissioners themselves, may be familiar in advance with the procedure to be observed. When the Commission of

<sup>1</sup> For the Protocol of submission and the finding of the International Commission of Inquiry, see *American Journal of International Law* (1908), Vol. II, pp. 929-936.

Inquiry sat for the first time, it was necessary to elaborate the procedure, and it seemed highly desirable to the Second Conference that the future commission should be relieved of this unnecessary duty and the delay involved. Therefore, based upon the experience acquired in the Commission of Inquiry which ascertained the facts of the Dogger Bank incident, Russia, Great Britain and France presented elaborate projects, which, after careful consideration and examination, formed the basis of the additions of the Second Conference to the provisions of the Convention of 1899.

The revised convention interferes in no way with the voluntary character of the inquiry, and states as before, although in amplified terms, that the inquiry convention defines the facts to be examined, determines the mode and time in which the commission is to be formed, and the extent of the powers of the commissioners, the place where the commission shall sit, whether it may remove to another place, the language or languages to be used, as well as the date on which each party must deposit its statement of facts, and, generally speaking, all the conditions upon which the parties have agreed. But, while the Convention of 1899 provided that the procedure should be specified in the agreement for submission or framed by the commission itself, if the agreement fails to establish the procedure, the revised Convention of 1907 elaborates a code in order to facilitate the constitution and working of commissions of inquiry, which shall be applicable to the inquiry procedure, in so far as the parties do not adopt other rules. That is to say, the parties in litigation are authorized to determine in advance all the details; but if they do not avail themselves of this privilege, then the rules of procedure devised by the Conference shall be applicable in so far as the parties do not adopt other rules. (Article 17.) The commission necessarily settles the details of procedure not covered by the special inquiry convention or the revised convention for the peaceful settlement of international disputes, and in addition arranges the formalities required for dealing with the evidence. As the

revised convention referred to contains elaborate procedure<sup>1</sup> it follows that the general procedure to be followed is settled and known in advance. The inquiry requires that both sides shall be heard; that each party communicates to the other the statement of facts, together with the instruments, papers and documents considered useful for ascertaining the truth, as well as the names of witnesses and experts whose evidence it wishes to present; that the commission is entitled to change its place of meeting, which, if not specified in the inquiry convention, shall be The Hague; that the place of meeting, once fixed, can not be altered by the commission except with the consent of the parties; that, if the commission desires to sit in a third state, the consent of such state shall be necessary; that the commission shall determine what languages are to be employed, if the inquiry convention shall have failed to specify this important matter; that the investigation and every examination of locality shall be made in the presence of agent and counsel, or, in their absence, if duly summoned they fail to appear, and that the commission is entitled to ask from each party explanations and information deemed necessary. The parties, on the other hand, undertake to supply the commission of inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to become acquainted with and accurately to understand the facts in dispute; that they likewise undertake to make use of the means at their disposal under their municipal law to insure the appearance of witnesses or experts within their territory who have been summoned before the commission, and if such witnesses or experts are unable to attend, to arrange for their depositions before qualified officials of their own country (Article 23); that for service of notices, as well as evidence, the commission shall apply directly to the third power or to the power in whose territory the commission sits, and that the power so applied to shall execute the request as far as its municipal law will allow, and may not refuse unless the questions are calculated to impair its sovereign rights or safety.

<sup>1</sup> Articles 18-36, 51 et seq.

The witnesses and experts are summoned at the request of the parties or by the commission on its own motion, but in every case only through the government and by the government of the state in whose territory they are. (Article 25.) As the testimony given by witnesses and experts is of fundamental importance in the ascertainment of the facts in dispute the convention has set forth clearly the rules and regulations concerning their examination: for example, the examination of the witness is conducted by the President, although members of the commission may put questions to the witness which are likely to throw light upon and complete his evidence. Agent and counsel of the parties may not interrupt the witness when making his statement nor put a question to him. They are not, however, deprived of the right to intervene, but questions they may desire to put to the witness are asked by the president. It will be seen that the method of cross-examination so familiar to English and American lawyers is excluded, because this method of investigation is practically unknown in civil law countries. It was deemed advisable to adopt the method familiar to most of the countries represented at the Conference and likely to make use of the convention. It can not be said that any injustice or inconvenience is likely to occur by means of this provision; for the commission is appointed to ascertain the facts in the controversy, and is as desirous as the agents of the parties to elucidate the truth. The questions put by the president and commission are likely to be searching, and the method adopted has the advantage of vesting the examination of witnesses in impartial, although not disinterested hands. As this procedure is well known in advance, agents and counsel may well conform to it, and, by submission of necessary questions, the president is in a position to meet their desires and make the examination as searching, as thorough and profound as the interests of justice require. (Article 26.)

The witness deposes orally and is not permitted to read a written draft. He may, however, by permission of the president, consult notes or documents necessary to refresh his



memory and assure the accuracy of his testimony. (Article 27.)

A minute of the evidence is drawn up and read to the witness, who may then make such alterations and additions as he thinks necessary, and, when the whole statement has been read, he is asked to sign it. (Article 28.) In this way the witness is allowed to testify freely and fully, without interruption by counsel, and when the testimony is handed him, he is able to correct any inaccuracies which may have slipped in.

The agents are authorized in the course of inquiry to present in writing to the commission and to the third party such statements, requisitions, or summaries of the facts as they consider useful for ascertaining the truth. (Article 29.)

The proceedings before the commission are thus finished. The commission is then called upon, by careful examination and weighing of the testimony submitted, to reach a finding. This is done in private, and the proceedings are secret. All questions are decided by a majority vote of the members of the commission, and if a member declines to vote, the fact is recorded in the minutes. The sittings of the commission are not public, nor are the minutes and documents published except by virtue of the permission of the commission, taken with the consent of the parties. (Article 31.)

When the parties have presented all explanations and evidence, and the witnesses heard, the president declares the inquiry terminated, and the commission retires to deliberate and draw up its report (Article 32), which is signed by all the members of the commission. If a member refuses to sign, this fact is mentioned, but the validity of the report is not affected. (Article 33.)

The report of the commission is read at a public sitting, the agents or counsel of the parties being present or duly summoned, and a copy of the report is given to each party. (Article 34.)

Each party pays its own expenses and an equal share of the expenses incurred by the commission. (Article 36.)

It is thus seen that the institution of the Commission of Inquiry depends solely upon the free and untrammelled consent of the parties in controversy, although the insertion of the phrase "desirable" in Article 9 of the revised convention brings a moral pressure to bear upon the parties to submit their controversy to a judicial inquiry. The parties are likewise at liberty to constitute the tribunal as they please and in the Inquiry Convention determine the proceeding in detail to be followed before the commission; but a code of procedure is recommended which, as it is the result of practical experience, will undoubtedly commend itself to the Powers at large. The parties are thus not only at liberty to resort to the commission or not to resort to it as they desire, but they are free to constitute it according to their judgment in such a way as to meet their approbation. If they have not, however, agreed to constitute the commission in a particular way, Article 12 of the revised convention provides that the Commission of Inquiry shall be formed in the manner determined in Articles 45 and 57 of the Convention for the Pacific Settlement of International Disputes. As this method of composition is the same as that for the constitution of the Tribunal of Arbitration, it seems advisable to consider it in connection with the permanent tribunal.

To summarize the results already obtained, it is therefore seen that the offer of good offices and mediation is voluntary, and that the offer is unlimited, so that it may extend to political questions, to questions of fact, or to judicial questions. The Commission of Inquiry is limited to the ascertainment of facts involved in a controversy. The Commission of Inquiry is, therefore, created for a specific and concrete purpose set forth in the convention, namely, the ascertainment of facts in controversy which have not been settled by diplomatic means, and which are either impossible or difficult of settlement by such means.

### 3. ARBITRATION AND THE PERMANENT COURT

The next division of the Convention is specific and relates to arbitration, which may be, by consent of the parties, general or may be limited to the solution of difficulties of a judicial nature. It will therefore be advisable to explain the theory of arbitration, and to consider the procedure devised for carrying into effect the agreement of the parties to arbitrate a disputed question.

The Convention of 1899 discussed the question of arbitral justice within the compass of five paragraphs (Articles 15-19), and the Revised Convention disposes of the subject in four articles (Articles 37-40.) The underlying principle is the same in each convention, and the voluntary character is unchanged. As in the cases of good offices or mediation and the Commission of Inquiry, the Conference supposes a desire that arbitration shall be resorted to, thus creating a moral though not a legal obligation. For the present purpose, it is unnecessary to set forth the various steps by which arbitration has become the favored means of settling international controversies of a judicial nature. It may be said, however, that the recourse to arbitration has been caused, or if not caused, has been facilitated by the fact that controversies between nations usually are of such a nature that they cannot be tried and settled satisfactorily in a national court of either of the contending parties, although it is recognized that they are susceptible of judicial treatment. The difficulty has been to create machinery, chosen by the contending parties, but which, nevertheless, shall by its institution and personnel offer a guarantee of impartiality; because if it be not impartial, a resort to it would be futile, and, in the second place, the result would be unsatisfactory. The two questions are, then, interrelated; for a recourse to arbitration can not be expected if nations do not have confidence in the machinery and in the arbitral award, and if the machinery prove defective, it must follow that cases will not be submitted to arbitral tribunals. Therefore, the Conference, while

treating them as distinct, for the theory and principle of arbitration may be considered separately and by itself, yet, nevertheless, felt it necessary to provide for the creation of a tribunal to which nations might safely resort in order to obtain a judicial settlement of a controversy which, if unsettled, might produce estrangement if not an actual resort to arms. Following the order of the Convention, each question will be considered separately.

The essence of arbitration is found to consist in the settlement of disputes between States by judges of their own choice on the basis of respect for law, and the recourse to arbitration implies an engagement to submit in good faith to the award. (Article 37.) The recourse is, however, voluntary, because if the parties do not wish to arbitrate, it follows that they will not choose judges to whom a question may be submitted; it is likewise essential that the award be based upon the respect for law, because if the law applicable to a case be disregarded, the award is not merely futile, but the system is discredited.

The Convention next considers the questions susceptible of arbitral decision, and finds them to consist in those of a legal nature, especially the interpretation or application of international conventions; and the Convention declares its faith in arbitration, not only from a theoretical view, but based upon experience, when it declares it to be the most effective and at the same time the most equitable means of settling disputes which diplomacy has failed to settle. It is but a step to declare a resort to arbitration desirable when nations have solemnly declared it to be the most effective and most equitable means, and this the Second Conference did in the following apt language, proposed by the Austro-Hungarian delegation:

Consequently, it would be desirable that, in disputes about the above-mentioned questions, the contracting Powers, if the case arise, have recourse to arbitration, in so far as circumstances permit.



The recommendation is, therefore, tentative, because it makes the recourse depend upon the circumstances of the case, and as to the permissibility or importance of arbitration, the contracting powers are necessarily the best qualified to determine; for a question primarily judicial may be so connected with the independence, the vital interest, and honor of a country that its government may be unwilling to submit it to arbitration. In the present state of public opinion, it can not well be imagined that a country would willingly, and of its own accord, submit the question of its independence to a tribunal, and the same objection seems to apply, though not so forcibly, to questions of vital interest and honor. Therefore, by general consent, as evidenced in practice, these three limitations upon recourse to arbitration are generally expressed and understood, although treaties do exist in which nations agree to submit all questions without excluding vital interests and honor.

In the next place, inasmuch as arbitration is voluntary, parties may determine whether or not they will submit existing difficulties or questions which may arise in the future, and it may be said in passing, that the fundamental difference between a special and a general recourse to arbitration lies in the fact that, in the one case nations bind themselves by a present voluntary agreement to submit past difficulties, whereas in a general treaty of compulsory arbitration nations oblige themselves in advance to submit difficulties that may arise.

Recourse to arbitration involves necessarily an agreement of the parties, because a court does not exist to which a suitor may resort and by summons compel the appearance of a defendant state. Given the voluntary nature of arbitration, it follows that the Arbitration Convention may embrace any dispute or disputes of a certain category. (Article 39.)

It will be seen later that in the Conference of 1899, as well as in the recent Conference, an attempt was made to secure a general agreement to arbitrate international difficulties arising from a carefully considered category of subjects which

would not involve questions of independence, vital interest, or honor, and that the powers bind themselves to submit disputes arising from these categories to arbitration. Arbitration would thus be voluntary for non-enumerated cases. It would be obligatory for the cases enumerated in the list. Neither Conference was willing or able to make arbitration in general or in special enumerated cases obligatory, except in the case of contract debts; but the recognition of arbitration as the most efficacious and equitable means, and the further declaration that a resort to arbitration is desirable, will undoubtedly prepare public opinion of the future for an agreement to submit cases susceptible of judicial decision to an arbitral tribunal. Arbitration will thus become an ordinary procedure in the future, either by express agreement or by the voluntary practice of enlightened nations.

It would seem that Article 19 (40 of the Revised Convention) was unnecessary, because it merely recognized a right which is inherent in sovereignty, namely, the right to conclude

new agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may consider it possible to submit to it.

But the presence of the article has given a great impetus to the negotiation of arbitration treaties and amply justifies its existence.

As, however, a resort to arbitration and the continuing resort to arbitration must depend upon confidence in the arbitral award, it follows that too great pains can not be taken to secure the establishment of a tribunal to which all may be willing to refer, and the great work of the First Conference, indeed its chief title to remembrance, lies in the creation of a court, in reality a panel of judges, to which nations might freely and with confidence resort for the constitution of a tribunal for the judicial settlement of international disputes. The creation of such an institution was not outlined in the Russian circulars, nor did it figure in the final program presented to the First Conference. It was, however, in accordance with

the spirit of the Conference and the spirit of the program. Therefore, the American delegation of 1899 went to the Conference with a clear and definite project for the creation of an international court of arbitration. The Russian Government, charged with the preparation of the program, does not seem to have given the matter attention, but during the Conference proposed a project. The British delegation, was seemingly without instructions on the subject, although it took the lead in establishing the court, and although the court was established in large part upon the motion and the project later introduced by Sir Julian Pauncefote, first delegate of Great Britain. The initiative was due to the American delegation,<sup>1</sup> but the credit of the institution does not belong to any one delegation or to any one man.<sup>2</sup> It is the result of a happy coöperation, in which all delegations took part, and the result, albeit in the form of a compromise, marks a distinct era in the world's history.

In the session of the Third Commission, charged with the consideration of Article 8 of the Russian program, Sir Julian Pauncefote, on May 26, 1899, a date worthy of remembrance in international progress, rose and made the following remarks:

Mr. President: Permit me to inquire whether, before entering in a more detailed manner upon our duties, it would not be useful and opportune to sound the Committee on the subject of a question which, in my opinion, is the most important of all, namely, the establishment of a permanent international tribunal

<sup>1</sup> See Instructions to the American Delegation of 1899, Vol. II, pp. 8-9.

It turns out that ours is the only delegation which has anything like a full and carefully adjusted plan for a court of arbitration. The English delegation, though evidently exceedingly desirous that a system of arbitration be adopted, has come without anything definitely drawn. The Russians have a scheme; but, so far as can be learned, there is no provision in it for a permanent court.—Andrew D. White's *Autobiography*, Vol. II, p. 255.

<sup>2</sup> This morning we had another visit from Sir Julian Pauncefote, president of the British delegation, and discussed with him an amalgamation of the Russian, British and American proposals for an arbitration tribunal. He finds himself, as we all do, agreeably surprised by the Russian document, which, inadequate as it is, shows ability in devising a permanent scheme both for mediation and arbitration.—*Ibid.*, p. 273.

of arbitration, such as you have mentioned in your address. Many proposed codes of arbitration and rules of procedure have been made, but up to the present time the procedure has been regulated by the arbitrators, or by general or special treaties. Now it seems to me that new codes and regulations of arbitration, whatever may be their merit, do not greatly advance the grand cause for which we are gathered here. If it is desired to take a step in advance, I am of the opinion that it is absolutely necessary to organize a permanent international tribunal which can be called together immediately at the request of contending nations. This principle once established, I believe we shall not have any difficulty in agreeing upon details. The necessity of such a tribunal and the advantages which it confers, as well as the encouragement and in the fact the prestige which it will give to the cause of arbitration, have been demonstrated with as much eloquence as force and clearness by our distinguished colleague, M. Descamps, in his interesting essay on arbitration, of which an extract will be found among the acts and documents so graciously furnished to the Conference by the Netherlands Government. I have no more to say upon this subject, but I would be very grateful to you, Mr. President, if before proceeding any further, you would consent to elicit the ideas and sentiments of the Committee upon the proposition which I have the honor of submitting to you, touching the establishment of a permanent international tribunal of arbitration.<sup>1</sup>

The question was submitted to the Committee of Examination, and the plan proposed by Sir Julian Pauncefote was by common consent accepted as the basis of the discussion. The various projects are set forth in the language of Mr. Holls, as the best qualified authority on this point.

The distinctive features of the British proposal were as follows:

1. The appointment by each Signatory Power of an equal number of arbitrators, to be placed upon a general list entitled Members of the Court;
2. The free choice from this list of arbitrators, called to form a tribunal for the particular cases submitted to arbitration by the various powers;
3. The establishment at The Hague of an international bureau acting as chancellery of the court;
4. The establishment of a council of administration and control, composed of the diplomatic representatives of the powers accredited to The Hague; the Minister of Foreign Affairs of the Netherlands being added as president upon the suggestion of Ambassador White.

<sup>1</sup> Conférence Internationale de la Paix, 1899, part IV, p. 3. The translation is taken from Holls' Peace Conference, pp. 234-237.



The Russian project had for its fundamental ideas the following: 1. The designation, by the present Conference, for a period which should last until the meeting of another similar Conference, of five powers, to the end that each of these in case of an agreement for arbitration, should nominate one judge either from among its own citizens or from without; 2. The establishment at The Hague of a permanent bureau with the duty of communicating to the five powers appointed the request for the appointment of arbitrators by the contending parties.

The American plan differed from the others chiefly in the following features: 1. The appointment by the highest court of each state of one member of the international tribunal; 2. The organization of the tribunal as soon as nine powers should adhere to the Convention; 3. The appointment of a particular bench, to sit for each case submitted, according to the agreement between the contending states. This agreement might call for the sitting of all the members of the tribunal, or for a smaller given number, not less, however, than three. Whenever the court consisted of not more than three judges, none of the latter should be a native, subject, or citizen of either of the litigating states; 4. The right of the litigating states, in particular cases, and within certain limits of time, to have a second hearing of the question involved before the same judges.<sup>1</sup>

The ideal court of arbitration would be one composed of a limited number of judges trained in the interpretation and administration of law, national as well as international, in session permanently at The Hague, and ready, upon application, to receive and decide controversies submitted to its consideration; but inasmuch as international arbitration is stated to have for its object the settlement of disputes between States by judges of their own choice, it would be necessary for the nations to agree in advance upon the constitution of a court and to agree likewise in advance to accept its personnel as competent for any controversy submitted to it during the tenure of office of the respective judges. In this way, the judges selected would be of their own choice. It would be permanent, but a small tribunal could not hope to include within it judges representing all the nations represented at the Conference, because in this way there would be a

<sup>1</sup> Holls' Peace Conference, pp. 238-239.

For the texts of the various proposals, see appendix, pp. 789-796.

judicial assembly rather than a limited and restricted court suited for the judicial determination of the questions submitted. The difficulty was met by the provision that each nation should select in advance, and for a period of six years, not more than four persons of

known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrator. (Articles 23, 44.)

This would not be a court—it would be a panel of judges—from which list the litigating nations could choose any desired number to constitute an arbitral tribunal. Not being a court, it could not be a permanent court; it would be, however, within the limits of the tenure, a permanent panel, from which the tribunal could be and would have to be constituted afresh for each case submitted to it. It was, however, a first and a great step toward the creation of a permanent tribunal, and undoubtedly, little by little, there will be established a permanent court of arbitration, accessible at all times, and conducting its proceedings according to international procedure adopted by the nations of the world represented in an international conference.

For the establishment of the temporary tribunal it was necessary to have at The Hague as the seat of the court, a clerical force, and for this purpose an international bureau was established to serve as the clerk of the court and as an intermediary between the Powers. This bureau should be charged with the custody of the archives and the administration of affairs relating to the court. The names of judges selected by the various Powers should be communicated to it and the list notified by the bureau. The Powers should likewise communicate to the bureau copies of arbitration conventions as well as arbitral sentences rendered by special tribunals. As the duty of the bureau is thus largely administrative, it should be created as well as controlled by a higher organization, composed of the representatives of the contracting powers. Therefore, a permanent administrative council

was created, consisting of diplomatic representatives of the Signatory Powers accredited to The Hague under the presidency of the Minister of Foreign Affairs of Holland. The duties of this council, as prescribed by the revised convention, can not be stated in clearer or briefer form than in Article 49, of the Revised Convention, which is as follows:

The Council settles its rules of procedure and all other necessary regulations.

It decides all questions of administration which may arise with regard to the operations of the court.

It has entire control over the appointment, suspension, or dismissal of the officials and employés of the bureau.

It fixes the payments and salaries, and controls the general expenditure.

At meetings duly summoned, the presence of nine members is sufficient to render valid the discussions of the council. The decisions are taken by a majority of votes.

The council communicates to the contracting powers without delay the regulations adopted by it. It furnishes them with an annual report on the labors of the court, the working of the administration, and the expenditure. The report likewise contains a résumé of what is important in the documents communicated to the bureau by the powers in virtue of Article 43, paragraphs 3 and 4.

By means, therefore, of these simple provisions, we have a permanent panel of judges from which a temporary tribunal may be constituted, an international bureau serving as the clerk, an administrative organization both in the constitution and in the operation of the court, and, finally, an administrative council for the control and supervision of the bureau, as well as for the communication of the reports of the labors of the court to the contracting powers. As the bureau is the agent of the contracting powers its expenses are borne by them in the proportion fixed for the international bureau of the Universal Postal Union. (Article 50.) The machinery thus exists for the working of the court, and its supervision, when created.

It is next necessary to consider the composition of the tribunal, and the procedure to be employed before it, two capital points, upon the success of which the resort to arbitration

must depend. It has been stated that arbitration is voluntary, and the resort to the permanent court is likewise voluntary. Powers in controversy may erect special tribunals or mixed commissions, or may refer a case to a single arbiter, but if they choose of their own volition the permanent court, then they must choose the judges from the general panel. They are at liberty to compose the arbitration tribunal according to their pleasure, but if they do not by direct agreement provide to the contrary, the following course shall be pursued:

Each party appoints two arbitrators, of whom one only can be its national or chosen from among the persons who have been selected by it as members of the permanent court. These arbitrators together choose an umpire.

If the votes are equally divided, the choice of the umpire is intrusted to a third power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different power, and the choice of the umpire is made in concert by the powers thus selected.

If, within two months' time, these two powers can not come to an agreement, each of them presents two candidates taken from the list of members of the permanent court, exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots determines which of the candidates thus presented shall be umpire. (Article 45.)

These provisions supplement and develop the corresponding article (24) of the First Convention in the interest of completeness and impartiality. Under the Convention of 1899, each party appoints two arbitrators from the permanent panel. By the Revised Convention, two arbiters are chosen, only one of whom may be selected from the subjects or citizens of the appointing power. It is thus seen that two of the four chosen must be strangers to the controversy and the umpire, however selected, is likely to be, although not necessarily so. These four choose an umpire, but if they fail to agree, a third power, selected by the parties in common, makes the appointment. It may well be that the parties in litigation fail to agree upon the third power, because an agreement upon the third power may well be an agreement upon the umpire. In such a case,



each litigant selects a different power, and the choice of an umpire is made in concert by the powers thus selected. But it may happen that the two powers selected fail to agree, and the tribunal, therefore, can not be constituted by this method. In such case, each of the two powers selected chooses two candidates from the list of members of the permanent court, excluding therefrom members selected by the parties, as well as their own citizens and subjects. Lot then determines which of the candidates thus presented shall be umpire. It thus follows that two at least of the members of the tribunal must be strangers to the controversy, and the umpire, whether selected by the parties in the first instance, or by arbiters of their choice or finally by the provisions of the Convention, is morally certain to be a stranger to the controversy. We thus have a guarantee of impartiality, based upon the fact that two of the five arbiters must be, and that a third is likely to be indifferent to the litigation. It is impossible to exaggerate the importance of these provisions, because an objection to arbitration has been and is that a member of the tribunal is more or less biased by national interest, and the less the representation of national interests, the greater the guarantee for its impartiality.

Article 46 expresses in succinct form the next step to be taken by the parties in litigation:

The tribunal being thus composed, the parties notify to the bureau their determination to have recourse to the court, the text of their *compromis*, and the names of the arbitrators.

The bureau communicates without delay to each arbitrator the *compromis*, and the names of the other members of the tribunal.

The tribunal assembles at the date fixed by the parties. The Bureau makes the necessary arrangements for the meeting.

The members of the tribunal in the exercise of their duties, and out of their own country, enjoy diplomatic privileges and immunities.

The tribunal is thus constituted for the submission of the case. It should be said, however, that a controversy may reach an acute stage without a suggestion from either party

that a resort be made to the permanent court. As in the first section of the Convention it was provided that any power might extend its good offices and mediation to a prospective belligerent, and that such offer should be considered a friendly act, so it was provided by the Convention of 1899 that the contracting powers could call attention to the permanent court and remind them of its existence. Good offices and mediation are not made a duty. It is a friendly act, but no state is obliged to offer its services. The revision of 1907, as previously stated, declared that the extension of good offices and mediation was desirable. The Convention of 1899 declared its faith in arbitration and the creation of its hands by providing that "the contracting powers consider it their *duty*, if a serious dispute threatens to break out between two or more of them, to remind these latter that the permanent court is open to them."

Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present convention, and the advice given to them, in the highest interests of peace, to have recourse to the permanent court, can only be regarded as friendly actions. (Article 27.)

But, as powers in controversy may be unwilling to enter into direct negotiations, and as Article 8 of the old and revised convention, provided that "seconds" might be appointed by the parties in controversy in order to reach an amicable solution of the difficulty, the Conference of 1907 provided that,

In case of dispute between two powers, one of them can always address to the international bureau a note containing a declaration that it would be ready to submit the dispute to arbitration.

The bureau must at once inform the other power of the declaration. (Article 48.)

This may be considered an explicit declaration that a power may do indirectly by means of the bureau that which it may do directly, but however unimportant a provision may be, if it is in the interest of peace, and facilitates a recourse to

arbitration and the permanent court, it should be regarded as a distinct advance, and to the writer this harmless provision is as progressive as it is simple of application.<sup>1</sup>

#### 4. ARBITRAL PROCEDURE

Supposing that the court is constituted for the consideration of the case, the matter of prime importance is the agreement for the submission to arbitration, which agreement is technically known as the *compromis*. As the recourse to arbitration is voluntary, it follows necessarily that the parties in litigation are to determine the nature and the extent of the question to be submitted for arbitration. And it also follows that the judgment of the court will only be acceptable in so far as it is responsive to the exact question submitted for decision. As the jurisdiction of the tribunal is created by the agreement of the parties, and as the award depends upon the care and skill with which the arbiters determine the exact point or points submitted for their consideration, the importance of settling in advance the issue is fundamental and can not be overlooked; indeed, the agreement upon the issue may be in effect decisive of the case and the negotiations leading to

<sup>1</sup> The amendment of 1907, due to the initiative of Peru and Chile, was contemptuously referred to more than once as a mere "bureau de poste," but it is scarcely necessary to point out that a bureau de poste, or boîte aux lettres has its uses. The article of 1899 and the amendment of 1907 denote progress to an International Bureau of good offices and mediation which, however opposed and delayed, is certain to be created.

For the discussions in 1899, see Conférence Internationale de la Paix, 1899, part IV, Comité d'Examen, pp. 17, 50-54; *ibid.*, proceedings of the Third Commission, pp. 53-58; and see a résumé of the discussions on Article 27, in M. Descamps' Report, pp. 95-97 of part I of the Conférence Internationale de la Paix.

For the discussion in 1907, see La Deuxième Conférence Internationale de la Paix, Vol. II, first Commission, First Sous-Commission, 11th Session, August 13, 1907; Proceedings of Plenary session, First Commission, 7th Session, October 7, 1907; Proceedings in Committee of Examination A, 17th session, October 1, 1907, and see further the résumé in Baron Guillaume's Report, La Deuxième Conférence Internationale de la Paix, Actes et Documents, Vol. I, pp. 421-424.

the formulation of the issue are of the gravest importance to all concerned. Reference to the controversy arising out of the alleged infractions of neutrality by Great Britain during the American Civil War, and the care with which the three rules of Washington were drawn up for application by the tribunal, shows that the agreement upon the issue is not only decisive, but that the difficulties connected with it often exceed the gravity of the task assigned to the court in applying them to the concrete facts submitted to the tribunal for its consideration. But, as in the case of the commissions of inquiry, it is a great advantage to prospective litigants to have a clearly-defined and well-understood code of procedure for their guidance. Uniformity is desirable, but uniformity must not be at the expense of the untrammelled judgment of the parties in framing the issue, else litigants may not resort to arbitration or to the court. The procedure, therefore, framed by the Conference, is in the nature of a recommendation, and its moral sanction is in practice found to be equivalent to an obligation. Therefore, the initial article of the Revised Convention concerning arbitration procedure, states the voluntary nature in the following apt language:

With a view to encouraging the development of arbitration, the contracting powers have agreed on the following rules, which are applicable to arbitration procedure, unless other rules have been agreed on by the parties. (Article 51.)

The voluntary nature of the *compromis* is thus clearly recognized and set forth by Article 52 of the Revised Convention, which is quoted in full:

The powers which have recourse to arbitration sign a *compromis*, in which the subject of the dispute is clearly defined, the time allowed for appointing arbitrators, the form, order, and time in which the communication referred to in Article 63 must be made, and the amount of the sum which each party must deposit in advance to defray the expenses.

The *compromis* likewise defines, if there is occasion, the manner of appointing arbitrators, any special powers which may eventually belong to the tribunal, where it shall meet, the language it shall use, and the languages the employment of



which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed.

The establishment of the *compromis* presupposes diplomatic negotiation and an agreement reached through diplomatic channels. As previously stated, an agreement may be reached with difficulty, and notwithstanding the good-will of parties litigant and their desire to reach substantial agreement, their efforts may nevertheless fail. Difficult in itself, the difficulty is enhanced by provisions of some countries which require the *compromis* to be submitted to a branch of the government other than that charged with diplomatic negotiations; for it may well happen that the determination of the executive may not be viewed with favor by the other branch of the government, be it a council, a senate, or a parliament, whose coöperation is necessary to give binding effect to the negotiations undertaken and concluded by the executive. The agreement to arbitrate, whether it be general or special, binds the contracting parties to submit the issue, when formulated, to arbitration, and an obligation therefore exists to formulate the *compromis*. If its formation be regarded as mere procedure, the agreement, however difficult, may be reached by the executive charged with the negotiation of the difference. If, however, the coöperation of the legislative branch of the government be necessary for its final sanction, delays inevitably occur, difficulties arise, and the problem, even were it simple, becomes complicated. In the United States the executive negotiates treaties, but their ratification is subject to the advice and consent of the Senate; in other words, the treaty-making power of the United States is vested in the executive and the Senate, and if the *compromis* be regarded as a part of the treaty-making power, it seems necessary that the coöperation of executive and Senate is necessary for the establishment of a *compromis* in the United States. It is true that the treaty creates the duty to negotiate it, but it is none the less true that the actual settlement of the *compromis* depends upon the happy coöperation of the executive and Senate. If they differ, the difference must

be compromised, and the agreement ultimately reached must then be submitted to the foreign power for its acceptance, amendment, or rejection. The governmental organ charged with the formation of the *compromis* must be indifferent to the foreign power. The duty to formulate is international but the formulation of it is a question of constitutional law of the respective States, for it is self-evident that an agreement to be binding upon a country must be concluded in accordance with the constitutional law of the country. Therefore, in the United States, as previously stated, the settlement of the *compromis* involves the coöperation of President and Senate, and a general or special treaty of arbitration must either reserve the coöperation of the appropriate branches of the Government, or it must be understood by the contracting parties that the formulation of the *compromis* can only be reached by the duly constituted internal organs of the Government.

The difficulty here mentioned is not fundamental, but may produce delay. Some foreign countries consider that a government able to settle the *compromis* without a recourse to legislative branches of the government is placed at a disadvantage, because being in a position to formulate the *compromis* by administrative act, the treaty not only obliges such a government to take the necessary action but binds it the moment it is taken, whereas the United States is not bound until the Senate has, by its advice and consent, given binding effect to the *compromis*. This view, although widely current, is fallacious, because a *compromis* being a diplomatic agreement, neither party is bound until both are, just as in the law of contracts neither party is bound until an acceptance of the offer. A *compromis* presented by Germany to the United States is merely an offer which may be withdrawn until it is accepted, that is, ratified by the duly constituted authorities of the United States, and as neither party is bound unless and until both are, the speciousness of the argument is apparent. A treaty may be prepared by Germany and accepted by the executive of the United States, but no one would seriously pretend that the

treaty was binding on Germany if it failed to be ratified by the Senate, because, to revert to the law of contracts, an offer is not binding until it is accepted, and the acceptance of the Senate is evidenced by ratification.

It is, however, apparent that an unwillingness or a refusal to formulate the *compromis* when the duty so to do is created and exists by a treaty, tends to discredit arbitration, because a duty is created and undertaken by the treaty which may be frustrated by a refusal to negotiate the *compromis*. Therefore, the Conference of 1907, "with a view to encouraging the development of arbitration," adopted a provision which, while it may facilitate the negotiation of the *compromis*, can not deprive the parties in controversy from settling it according to their matured judgment and understanding of the necessities of the case. The article in question follows in translated form:

The Permanent Court is competent to settle the *compromis*, if the parties are agreed to have recourse to it for the purpose.

It is similarly competent, even if the request is only made by one of the parties, when all attempts to reach an understanding through the diplomatic channel have failed, in the case of:

1. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, and providing for a *compromis* in all disputes and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the court. Recourse can not, however, be had to the court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one power by another power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way. (Article 53.)

The first paragraph of this article seems wholly unobjectionable, because nations may themselves negotiate the *com-*

*promis* or refer its establishment to a person or body possessing their confidence. The remaining paragraphs of the article aim to facilitate the formulation of the issue by means of the permanent court, upon application of one of the parties litigant, when diplomatic negotiations have failed to result in the *compromis*; but the resort to the court is voluntary, and the competence of the court may be excluded directly or indirectly.

In the first place, the provision has no retroactive effect, and applies merely to general treaties of arbitration concluded or renewed after the present Convention has come into force. Article 51 previously quoted, states that the contracting powers have agreed on the following rules unless other rules have been agreed on by the parties. If, therefore, the parties do not wish the court to be competent, they may, in the body of the treaty of arbitration, expressly exclude the competence of the court, or by the establishment of other means inconsistent with the coöperation of the court, its competence is withdrawn. Thus, a provision in a treaty of arbitration, to which the United States is a party, providing that the *compromis* is to be made by the President with the advice and consent of the Senate, excludes the competence of the court directly, because it makes its formulation dependent upon the coöperation of the treaty-making power of the United States.<sup>1</sup> The most that can be said is that an option is created by the Conference, which option may be exercised by the parties, who are thus free to accept or reject the provisions of the article in any treaty concluded or renewed after the ratification of the Convention.

In the next place, the right is reserved to a litigant to exclude the coöperation of the permanent court,

if the other party declares that in its opinion the dispute does

<sup>1</sup> For resolution of the Senate excluding, in the ratification of the Convention for the Pacific Settlement of International Disputes, the competency of the Permanent Court to frame the *compromis*, see Vol. II, pp. 355-356.



not belong to the category of disputes which can be submitted to compulsory arbitration.

The meaning of this is that if the defendant, to use the language of the law court, pleads that its independence, vital interest or honor, of which it is the sole judge, is involved, the court is incompetent to frame the *compromis*. It may be, however, that the parties have provided specifically in the treaty that the court shall be competent in all cases, and if this general consent has been given in advance, the element of compulsion is absent, by reason of the express consent of the contracting parties. The action of the court, therefore, is purely voluntary; it may aid, but it can not compel.

The last paragraph seeks to aid the formulation of the *compromis* in cases arising out of contract debts. The Convention concerning the limitation of force in the collection of contract debts provides that the contracting powers shall renounce the use of force in the collection of such debts, but makes this renunciation dependent upon the acceptance of arbitration, upon the formulation of the *compromis* and upon the execution of the award when rendered by the arbitral tribunal. If, therefore, arbitration be refused, or if the *compromis* be not formulated, the benefit of the renunciation of force is lost. To prevent this unfortunate state of affairs, the Conference invested the Permanent Court with the power of formulating the *compromis* but, as in the previous case, made the competence of the court dependent upon the express consent of the parties in controversy; for it is stated that

this arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

The intervention of the court is, therefore, dependent upon the volition of the contracting parties. That there may be no doubt as to the voluntary nature of the entire transaction, it is necessary to state in this connection, that there is no permanent court either in being or in session; that the tribunal

for the establishment of the *compromis* can only be created from the permanent panel of judges, misnamed the Permanent Court, by the coöperation of the parties, and that if they are unwilling to invest the so-called permanent court with this important function, they will not create it. As the court is not a permanent body to which the dispute may be referred, but has to be created for each particular case to be submitted to it, it follows that parties litigant will not establish it until they have agreed upon the issue to be presented, unless by a previous agreement and understanding, they wish to invest the court with the formulation of the *compromis*. It follows necessarily, therefore, that the provisions of the article neither change the voluntary nature of arbitration nor deprive the parties of the right freely to determine the *compromis*. It can serve merely as an aid, not as a hindrance. In cases in which the formulation of the *compromis* is considered as a branch of arbitral procedure, and not as a part of the treaty-making power, the competence of the court may be of no little service; for, in the absence of constitutional difficulties, the establishment of the *compromis* as well as the consideration of the case by an impartial tribunal may not only safeguard, but advance international justice.

The Convention considers an arbitration tribunal composed of five as the type, but as the parties are free to constitute the tribunal according to their judgment, it follows that the duties of arbiter may be conferred on one arbiter alone, or upon several arbitrators selected by the parties as they please, or chosen by them from the members of the Permanent Court of Arbitration, established by the present Convention. (Article 55.)

Should one of the arbiters die, retire, or be unable for any reason to discharge his functions, the vacancy is filled in the same manner as the original appointment. (Article 59.)

The umpire is president of the tribunal, *ex officio*, and when the tribunal does not include an umpire, it appoints its own president. (Article 57.)

It may be, as it very often has been the case in the past, that a sovereign or chief of state is chosen as arbitrator, and

in such a case it seemed inadvisable to determine the procedure to be followed. Arbitral procedure is, therefore, settled by him. (Article 56.)

The Convention leaves the seat of the court open to an agreement of the parties, but provides that it shall sit at The Hague unless another place is selected. When the place of meeting is fixed it can not be altered by the tribunal, except with the consent of the parties, nor can it sit in the territory of a third power without the latter's consent. (Article 60.)

By agreement of the parties, the tribunal has thus been constituted, the issue to be presented determined, and the court is in session at The Hague, ready for the consideration of the case. It is now necessary to consider the procedure to be followed and the successive steps to be taken in order to obtain a judgment of the tribunal.

In the first place, as parties must be represented before the tribunal by special agents to act as intermediaries between them and the tribunal, it is almost superfluous to mention that States in litigation possess the same rights as private litigants in municipal courts of justice, namely, that they may be represented before the tribunal by counsel or advocates of their own choice. There is, however, a limitation upon the selection of advocates, in the interest of impartiality of the proceedings, for in Article 62 it is stated that:

The members of the Permanent Court may not act as agents, counsel, or advocates, except on behalf of the power which appointed them members of the court.

This provision is objectionable because it allows a member of the court, and therefore a prospective judge, to appear and argue before the tribunal selected from the permanent panel. It is fundamental that one can not be judge and advocate in his own case, and that a member of the court should not appear before it as attorney, counsel, or advocate.<sup>1</sup> The American

<sup>1</sup> The American delegation of 1899 called attention to the impropriety of a judge of the Permanent Court appearing as agent or advocate before his fellow judges forming the Tribunal of Arbitration. For the discussion

delegation sought to amend this provision in the above sense, but was unable to do so, as it seemed to the majority unfair to deprive a litigant state of its best counsel, simply because he was inscribed on the list of judges. It was suggested that lawyers were numerous, even in the smallest countries, but the amendment was unacceptable to the majority.

"As a general rule," says Article 63, "arbitration procedure comprises two distinct phases: pleadings and oral discussions.

"The pleadings consist in the communication by the respective agents to the members of the tribunal and the opposite party of cases, counter-cases, and, if necessary, of replies; the parties annex thereto all papers and documents called for in the case. This communication shall be made either directly or through the intermediary of the international bureau, in the order and within the time fixed by the *compromis*.

"The time fixed by the *compromis* may be extended by mutual agreement by the parties, or by the tribunal when the latter considers it necessary for the purpose of reaching a just decision.

"The discussions consist in the oral development before the tribunal of the arguments of the parties."

It is thus seen that the first phase of arbitral procedure is preliminary or preparatory to the second, and that, as it consists in exchange of the various documents composing the cases, it is as unnecessary that the tribunal be in session as it would be that a court remain in session while the counsel in a case prepared the pleadings for ultimate presentation to the court. Article 65 recognizes this, and provides that "unless

in the First Conference, see *La Conférence Internationale de la Paix*, 1899, part IV, Comité d'Examen, pp. 74-75; *Ibid.*, Third Commission pp. 60, 65-66; M. Descamps' Report, p. 101 of part I, *Conférence Internationale de la Paix*.

In 1907 a proposal was made and rejected to forbid a member of the permanent panel from appearing as agent or advocate before the temporary tribunal. For discussions, see *La Deuxième Conférence Internationale de la Paix*, Vol. II, Comité d'Examen C of the First Commission, 9th Session, September 11, 1907; Comité d'Examen A of First Commission, 17th Session, October 1, 1907; Baron Guillaume's Report *Deuxième Conférence Internationale de la Paix*, Actes et Documents, Vol. I, p. 132.



special circumstances arise, the tribunal does not meet until the pleadings are closed." And of the special circumstances, the tribunal itself will be the necessary judge. The intention of the framers of the convention clearly was to preserve the distinction between the two phases of arbitral procedure by providing that each should be finished before the other began. Therefore, Article 67 says:

After the close of the pleadings, the tribunal is *entitled* to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party.

It is familiar doctrine that there must be an end to litigation, and it is the opinion of the Convention that there must be an end to the preparation of the case, and that when once closed, it should not be opened without the consent of the other party; otherwise it would be within the power of one litigant unduly to prolong the proceedings, or in case of bad faith, either to prevent an award or by delay and sharp practice to cast discredit upon the proceedings of the tribunal. It is hardly necessary to add that a certified copy of every document produced by one party must be communicated to the other. (Article 64.)

Supposing, therefore, that the *compromis* sets forth clearly, accurately and precisely, the questions at issue; that the tribunal has been constituted by the agreement of the parties; that the various documents in the case have been presented to the arbiters and to the parties in litigation, that the pleadings are, in the language of the convention, closed, and that the tribunal is in session for the disposition of the case as presented, it becomes necessary to consider the procedure to be followed in the second phase, for the previous steps, technically termed the pleadings, are preparatory and preliminary to the trial of the case before the tribunal. This phase of the procedure is not improperly termed the oral discussion, because the case as made out in the preliminary proceedings is now presented orally and urged upon the arbiters in session.

The discussions are under the control of the president; they are only public if it be so decided by the tribunal, with the assent of the parties; they are recorded in the minutes drawn up by the secretaries appointed by the president; and the minutes, signed by the president and secretary, alone possess an authentic character. (Article 66.)

The purpose of the tribunal is not merely to decide the case, and thus end the controversy, but to decide it justly upon all evidence which may properly be submitted to it. Therefore, the tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties, and in this case, the tribunal has the right to require the production of such papers or documents, but is necessarily obliged to make them known to the opposite party, in order that their exact meaning and effect may be appreciated and fully established. (Article 68.) And it is not merely a requirement of good faith, but it is a conventional obligation that the parties supply the tribunal with all the information desired for the decision of the case. (Article 75.)

It may, however, happen that the tribunal itself becomes aware of the existence of various papers tending to elucidate the controversy. In such case, the production of the papers may be required, and the tribunal can demand all necessary explanations. In case of refusal, note is properly taken of it. (Article 69.)

It may be that the evidence necessary for the consideration of the tribunal is within the control of neither of the parties. The contracting powers, therefore, pledge their coöperation. The proceeding in such case is specified with admirable brevity in Article 76 as follows:

For all notices which the tribunal has to serve in the territory of a third contracting power, the tribunal shall apply direct to the government of that power. The same rule applies in the case of steps being taken to procure evidence on the spot.

The requests for this purpose are to be executed as far as the means at the disposal of the power applied to under its

municipal law allow. They can not be rejected unless the power in question considers them calculated to impair its own sovereign rights or its safety.

The court will equally be always entitled to act through the power on whose territory it sits.

The members of the tribunal are necessarily entitled to put questions to agents and counsel of the parties, and to ask that doubtful points be explained; but as the questions put and the remarks made by members of the tribunal in the course of discussion are meant solely to establish the facts involved, such questions should not be regarded as an expression of opinion by the tribunal in general, or by its members in particular. (Article 72.)

It may happen that, however carefully drawn, the *compromis* may be ambiguous, and thus require interpretation. It is familiar doctrine that the tribunal should be competent to interpret the *compromis*; otherwise the proceedings would be delayed, if not stopped.<sup>1</sup> In the same way, the tribunal should be competent to interpret treaties which may be invoked, and it necessarily is judge of the principles of law to be applied unless the law shall have been specified in the *compromis*. In this case, however, the tribunal would be competent to interpret and apply the law, because the competency of the court extends to the *compromis* in all its parts. (Article 73.)

In like manner, the tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms, order, and time in which each party must conclude its arguments,

<sup>1</sup> A controversy arose in the Proceedings before the Mixed Commission organized under Article VII of Jay's Treaty as to the power of the Commission to determine its jurisdiction. This was settled in favor of the Commission and has ever since been accepted as corrected. Lord Chancellor Loughborough, to whom the question was referred, replied, "That the doubt respecting the authority of the commissioners to settle their own jurisdiction was absurd; and that they must necessarily decide upon cases being within, or without, their competency." See Moore's International Arbitrations, Vol. I, pp. 324-328; De Lapradelle et Politis: Recueil des Arbitrages Internationaux, Vol. I, pp. 99-105.

and to arrange all the formalities required for dealing with the evidence. (Article 74.)

The tribunal necessarily considers the weight of the evidence, and of the documents presented. In this they are aided, necessarily, by the agents or counsel, who are authorized to present to the tribunal all the arguments they may consider advisable in the defense of their case. (Article 70.) They are entitled to raise objections and points, but, as intimated, the decision of the tribunal on these points is final, and therefore can not form the subject of discussion. (Article 71.)

It is the duty of the agents and counsel to force their arguments upon the court, and as the purpose of the tribunal is to inform itself accurately as to the bearing of the argument, it follows that the tribunal may, of its own motion, solicit explanations on doubtful points. (Article 72.)

When the agents and counsel have submitted all the explanations and evidence in support of their case, their function ceases, and the judicial duty of the tribunal begins. The president thereupon declares the discussion closed, and the tribunal considers, in the light of the evidence and the arguments, the decision to be reached. (Article 77.)

The deliberations of the tribunal are necessarily secret, and it seems advisable that the proceedings of the council chamber should not be made public. It is not to be expected in all cases that unanimity may be reached; therefore, all questions are decided by a majority vote of the members of the tribunal. (Article 78.)

The decision of the tribunal is termed an award, and must give the reasons on which it is based. In matter of form, it contains the names of the arbitrators, and is signed by the president and registrar, or by the secretary, acting as registrar. (Article 79.)

The reason for the signature of the president and registrar is that the award reached is the solemn judgment of the tribunal, and the signature of the president and registrar certifies the authenticity of the judgment—it does not express the opinion of the president as such, for his signature merely



guarantees the authenticity of the award. While the judgment is the result of deliberation in private, the award is read in public sitting, the agents and counsel of the parties being present or duly summoned to attend. (Article 80.)

The question naturally arises as to the effect of the award. The agreement to submit may specify the authority to be attached to the award, but in the absence of a stipulation to the contrary, the award, duly pronounced and notified to the agents of the parties, settles the dispute finally, and without appeal. (Article 81.)

There must be an end of litigation, and it is presumed that the parties submitted the question in order to reach a definitive solution. It is in the interest of the parties that the decision be accepted as final, but it is essential to the prestige of international arbitration that the decision be just as well as final; for parties will not submit questions to a tribunal if the judgment does not carry with it the conviction of justice. It may happen that the decision is ambiguous, and therefore, as in the case of the *compromis*, the tribunal might well be clothed with the power of interpreting the award; therefore, Article 82 provides:

Any dispute arising between the parties as to the interpretation and execution of the award shall, in the absence of an agreement to the contrary, be submitted to the tribunal which pronounced it.

It may well be, however, that the parties in controversy reserve in the very act of submission the right to demand the revision of the award. The happy phrase of our President Lincoln renders argument unnecessary: "Nothing is settled until it is settled right," and in view of this necessity, the American delegation in 1899 insisted successfully that the right of revision might be reserved in the *compromis*, and in the Conference of 1907, the American delegation likewise successfully resisted the proposed rejection of the right of revision incorporated in the First Convention. Article 55, incorporating this view, was adopted by the majority of the First Con-

ference, and in 1907, notwithstanding the efforts of a persistent and active minority, the article remained unchanged. It is as follows:

The parties can reserve in the *compromis* the right to demand the revision of the award.

In this case, and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the award, and which was unknown to the tribunal and to the party which demanded the revision at the time the discussion was closed.

Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

The *compromis* fixes the period within which the demand for revision must be made. (Article 83.)<sup>1</sup>

In the next place, the award can only affect the parties in dispute, for it is familiar doctrine that a litigant must have his day in court, and that a judgment to which he is not a party and in which he did not have the right to appear can not be binding upon him. Therefore, Article 84 limits the award to the parties in dispute, but as it may well happen that a decision in a particular case may affect others than the parties directly in litigation, the Convention provided that any

<sup>1</sup> This article was the result of prolonged discussion in both Conferences. The American delegation of 1899 was instructed to secure the right of revision in the following terms: "Every litigant before the International Tribunal shall have the right to make an appeal for reëxamination of a case within three months after notification of the decision, upon presentation of evidence that the judgment contains a substantial error of fact or law." (See Vol. II, p. 16.)

The discussions of 1899 will be found in *La Conférence Internationale de la Paix*, 1899, part IV, Comité d'Examen, pp. 38-39, 43-47, *ibid.*, proceedings in the Third Commission, pp. 26-31. M. Descamps' Report, pp. 105, 106, of part I of the *Conférence Internationale de la Paix*.

For the discussions in 1907, see *La Deuxième Conférence Internationale de la Paix*, Vol. II, First Commission, First Sous-Commission, 11th Session, October 13, 1907; Plenary Session, First Commission, 7th Session, October 7, 1907; Baron Guillaume's Report, *La Deuxième Conférence Internationale de la Paix*, Actes et Documents, Vol. I, pp. 438-439.

parties interested in the award are entitled to intervene in the case. To quote the exact language of the Convention:

When it concerns the interpretation of a convention to which powers other than those in dispute are parties, they shall inform all the Signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them.

It should be said, in conclusion, that each party pays its own expenses, and an equal share of the expenses of the tribunal. (Article 85.)

The constitution of the court and the procedure before it are complicated, and experience shows that parties are unwilling to submit small cases to it, both on account of the delay, as well as the expense involved. Therefore, upon the initiative of the French Delegation, the Conference of 1907 devised rules and regulations, with a view to facilitate the working of a system of arbitration in disputes admitting of summary procedure. The contracting powers, adopted the following rules to be observed in the absence of other arrangements, and subject to the reservation of the provisions of Chapter III, in so far as applicable. The rules in question are set forth in the following four paragraphs, which are so clear and precise as to require little explanation. They are, therefore, set forth without comment:

Each of the parties in dispute appoints an arbitrator. The two arbitrators selected choose an umpire. If they do not agree on this point, each of them proposes two candidates taken from the general list of the members of the Permanent Court, exclusive of the members appointed by either of the parties, and not being nationals of either of them; which of the candidates thus proposed shall be the umpire is determined by lot.

The umpire presides over the tribunal, which gives its decisions by a majority of votes. (Article 87.)

In the absence of any previous agreement, the tribunal, as soon as it is formed, settles the time within which the two parties must submit their respective cases to it. (Article 88.)

Each party is represented before the tribunal by an agent, who serves as intermediary between the tribunal and the government who appointed him. (Article 89.)

The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and experts should be called. The tribunal has, for its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in Court it may consider useful. (Article 90.)

Such, in brief, are the provisions of the convention for the peaceful adjustment of international disputes, framed by the Conference of 1899, and revised by the Conference of 1907. The Convention as a whole has but a single object, namely, to prevent the recourse to arms in matters which are susceptible of a peaceful and judicial settlement. Good offices and mediation are raised to the dignity of an international right, and their exercise is, by the express agreement of the contracting powers, not to be considered an unfriendly act. The Commission of Inquiry is created and furnished with an elaborate procedure. Arbitration is recognized as at once the most efficacious and equitable means of settling an international dispute incapable of adjustment by diplomatic means. A permanent panel of judges is created, from which the parties may select a temporary tribunal, to which the question in dispute may be submitted for adjudication. The parties are free to constitute the tribunal in any manner which seems to them most likely to secure an impartial and judicial decision. They are free to establish the *compromis* defining the issue and prescribing the procedure to be followed; but the Conference recommended a carefully devised code of procedure, which, although it lacks a legal, nevertheless possesses a great moral sanction, and in order to facilitate the submission of cases to arbitration, provision is made for a smaller court, and a simplified procedure, in order that delays may be prevented and expense reduced to a minimum.

The Convention of 1899 for the Peaceful Settlement of International Disputes, and in a lesser degree the revision of 1907, were the result of great discussion and the careful weighing of each provision creating or seeming to create an obligation upon the States represented at the Conference. The



simplest and seemingly innocent article was subjected to a critical examination in order that the States might know in advance the obligation assumed. The greater States were as a rule willing to assume a legal obligation whereas the smaller States, particularly the Balkan Peninsula, feared that the acceptance of a legal obligation was a renunciation of their sovereignty. This attitude seemed at times incomprehensible to the larger States accustomed to sovereignty and sure of its continued possession. The Balkan States looked upon their sovereignty as sacred, and, in view of the sacrifice at which their independence was purchased, it was perhaps natural that they should cherish it as a treasured possession and fear that good offices and mediation, commissions of inquiry, the recognition of arbitration although voluntary and the duty to resort to it might deprive them of the freedom of action in a crisis, not to be discussed at a conference, but nevertheless within the range of possibility. The result was that a clean-cut legal obligation was reduced to a recommendation by the addition of the modifying phrase, if it is possible, as far as circumstances permit. The *juris vinculum*, dear to the civilian, was thus lacking; but an obligation, recognized in the moral if not in the legal forum was created. The good faith of the contracting parties was pledged and a moral obligation in the world of international relations is shown to have the force of law. In a certain sense all international contracts rest upon good faith, because an international executive with power to enforce obedience is unknown to international law. Public opinion is its only sanction; but public opinion takes no note of legal subtleties and enforces a legal right or condemns a moral wrong with indifference. The power of an idea for good cannot be measured by logic nor the progress of the world defeated by the absence of a *juris vinculum*. The test of a provision is that it carries obedience with it and the moral obligations of the convention of 1899 for the peaceful settlement of international disputes have already borne fruit.<sup>1</sup>

<sup>1</sup> See Mr. Root's address on the Sanction of International Law, American Journal of International Law, Vol. II, 1908, pp. 451-457.

It is, however, a matter of importance and of no little interest to point out some of the difficulties met and overcome in drafting the convention. These difficulties are in the supposed legal obligation in the original drafts of good offices (Article 3); commission of inquiry (Article 9); the compulsory character of arbitration; the establishment of the permanent court in general; the duty of Signatory Powers to call the attention of Powers in controversy to the fact that the court is open to them. (Article 27).

In regard to good offices and mediation, M. Veljkovich of Serbia proposed to insert in the text of Article 3—providing that the offer of good offices and mediation can never be considered as an unfriendly act—the clause that *refusal to accept* the proffer cannot be regarded as unfriendly. The reason for the amendment lay in the fact that it might be difficult for a small power to refuse an offer made by large and powerful States, which might take umbrage at a refusal unless it were specifically understood that the offer and the refusal stood on an equality.

Again, the voluntary nature of good offices and mediation was insisted upon.

In the name of the Royal Government of Serbia, we have the honor to declare that the adoption by us of the principle of good offices and mediation does not imply a recognition of the right of a third state to use these means other than with the extreme reserve required by the delicate nature of the transaction.

We only admit good offices and mediation on condition that they preserve fully and integrally their character of purely friendly counsel and we will never accept them in such forms and circumstances as impart to them the character of intervention.<sup>1</sup>

The slight addition of the word “desirable” to Article 3, making the offer of good offices and mediation desirable as well as useful, was accepted in 1907 without criticism or comment, although it would undoubtedly have provoked opposi-

<sup>1</sup> Vol. II, pp. 165–166. See M. Descamps' Report, Articles 3, 8, pp. 77–80, Conférence Internationale de la Paix, part I.

tion in 1899. A thing may be useful without being desirable, and desirability is a step toward an obligation.

The commission of inquiry due to Russian initiative in 1899 justified in 1904 its creation by preventing, it may be, war between Russia and Great Britain from the Dogger Bank incident. Article 9 creating the institution is as follows:

In disputes of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the Contracting Powers deem it expedient and desirable<sup>1</sup> that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

The original Russian draft imposed an obligation of the mildest and seemingly unobjectionable kind:

In cases in which divergences of views occur between the Signatory States in connection with local circumstances giving rise to litigation of an international character which cannot be settled by the ordinary diplomatic means but in which neither the honor nor vital interests of these States are engaged, the governments interested *agree to institute* (conviennent d'instituer) an international commission of inquiry in order to arrive at the causes of the disagreement and to clear up on the spot, by an impartial and conscientious examination, all questions of fact.<sup>2</sup>

Dr. Lammasch of Austria-Hungary feared that the obligation to institute the commission would provoke criticism, and therefore proposed in the Committee of Examination to recommend the institution as useful but to leave recourse to it voluntary. The committee, however, retained the obligation, softening it as follows:

Agree to have recourse as far as the circumstances permit (conviennent de recourir, en tant que les circonstances le permettent).

<sup>1</sup> The word "desirable" was added in 1907 at the instance of the American delegation.

<sup>2</sup> See appendix, p. 783.

As thus framed, the institution was savagely attacked by M. Beldiman of Roumania as an innovation contrary to the sovereignty of States and as offering manifold dangers by reason of the obligation created by the wording of the article.<sup>1</sup> Servia called attention to the inequality between the large and small States in that the weak would be forced to consent to inquiry at the behest of the strong; Greece formulated its reserves and Bulgaria stated that recourse to the institution should be voluntary. As a result of these objections and in a spirit of compromise, the Committee of Examination proposed a formula according to which (in controversies of an international nature arising from a difference of opinion upon facts)

the Signatory Powers deem it expedient (*jugent utile*) in order to facilitate the solution of these controversies that the parties who have not been able to reach an agreement through diplomatic channels institute commissions of inquiry in order to clear up by an impartial and conscientious examination all questions of fact.

The voluntary character of this article seemed to be clear and was satisfactory to Persia and Greece. Roumania, however, insisted that the States were not sufficiently safeguarded; that controversies engaging the honor or essential interests should not be included, and that the further qualification "as far as circumstances permit" be incorporated in the article. M. Beldiman stated that his government could only accept the institution provided these concessions were made, and the commission in a spirit of conciliation adopted his text of Article 9 as it stands in the Convention of 1899 and the revision of 1907. The attempt of Russia to make recourse to the commission of inquiry obligatory failed in the present Conference as it seemed inadvisable to reopen the subject.

The obligation to have recourse to the commission is thus purely moral and the letter of the text seems to exclude ques-

<sup>1</sup> *Conférence Internationale de la Paix*, 1899, part IV, Third Commission, pp. 32-38.



tions involving honor and essential interests. This does not and cannot mean that powers in controversy may not submit such questions to a commission; for as sovereign states they are free to do what seems best in view of all the circumstances. The article means that a power is not to be forced against its will to constitute a commission of inquiry when in its opinion its honor and essential interests are involved. The attempt of Russia to amend Article 9 by investing the commission with the power to find responsibility as well as the facts likewise failed in 1907.<sup>1</sup> And yet it is to be noted that in the only instance in which a Commission of Inquiry has been formed, in the Dogger Bank incident, the honor and essential interests of Russia and Great Britain were involved, and, by special agreement between the two countries, the commission was empowered to find and actually did find responsibility.<sup>2</sup>

Notwithstanding that there was no legal obligation to resort to the commission of inquiry, its very existence forced Great Britain and Russia to have recourse to it, and there can be no doubt that the insistence of public opinion will force resort to the commission in spite of its voluntary character and irrespective of honor or essential interests being involved. Franklin's statement that "there never was a good war or a bad peace," is nearer acceptance today than it was a hundred years ago.

The next struggle in the Conference was over the subject of arbitration and the establishment of the so-called permanent court. As will be seen presently, the Russian government presented a carefully selected list of subjects of a purely legal nature for compulsory arbitration. Questions of a political nature, as well as those involving vital interests and national honor were excluded, and it was hoped that the countries might well bind themselves in advance to arbitrate contro-

<sup>1</sup> See Baron Guillaume's Report, *La Deuxième Conférence Internationale de la Paix*, 1907, Actes et Documents, Vol. I, pp. 402-403.

<sup>2</sup> For the protocol between Great Britain and Russia, and the finding of the International Commission of Inquiry, see *American Journal of International Law*, Vol. II, pp. 929-936.

versies arising out of the various cases enumerated in the list. For example, it did not seem impossible to agree to arbitrate pecuniary claims when the principle of indemnity was admitted and it only remained to tax the amount of the damage. This time it was the opposition of a great power that defeated the will of the overwhelming majority. Dr. Zorn declared that Germany, without desiring to modify existing conventions which established the principle of compulsory arbitration, did not consider the experience up to date sufficient to give a more general and immediate development to these conventions; and that a too rapid introduction of compulsory arbitration into International Law offered greater danger than advantage from the point of view of peace between the States. Inasmuch as there were more than a hundred cases actually arbitrated or pending from the conclusion of Jay's Treaty in 1794 to the opening of the Conference, it must be said that desire rather than experience was lacking.

The opposition of Germany would not yield to argument and as a result Article 19 of the Convention of 1899 was framed and adopted permitting but not requiring nations to conclude arbitration treaties. Seemingly a surrender rather than a compromise, and with not the slightest suggestion of compulsory arbitration either in its letter or spirit, this confession of defeat has been the starting point of the series of arbitration treaties fast encircling the world in a web of peace. The recommendation in International Law is not far removed from a command, and Germany, as will be seen, has negotiated two general treaties of arbitration, one with Great Britain and another with the United States, which latter was unfortunately not ratified by the Senate, or rather was ratified in amended form.

As Roumania rejected the suggestion of an obligation in the commission of inquiry, it can readily be imagined that "The Royal Government," as M. Beldiman was pleased to term it, was opposed to any article pledging it to arbitrate an international difference because its freedom of action would thus be hampered. Therefore, in regard to the object of international

arbitration (Article 15) the recognition of arbitration as the most efficacious as well as the most equitable means (Article 16) and the obligation to submit in good faith to the arbitral award (Article 18) the Delegation of Roumania formulated the following reserves repeated in like terms for the revision of 1907:

The Royal Government of Roumania, being completely in favor of the principle of facultative arbitration, of which it appreciates the great importance in international relations, nevertheless, does not intend to undertake, by Article 15, an engagement to accept arbitration in every case there provided for, and it believes it ought to form express reservations in that respect.

It cannot therefore vote for this Article, except under that reservation.

The Royal Government of Roumania declares that it can not adhere to Article 16 except with the express reservation, entered in the *procès-verbal*, that it has decided not to accept, in any case, an international arbitration for disagreements or disputes previous to the conclusion of the present Convention.

The Royal Government of Roumania declares that in adhering to Article 18 of the Convention, it makes no engagement in regard to obligatory arbitration.<sup>1</sup>

The project for a permanent court of arbitration likewise met with Germany's disapproval, but, at the sacrifice of compulsory arbitration, the consent and active coöperation of Germany were gained for the court. Dr. Zorn was as earnest and zealous in the creation of the court as any member of the Conference as soon as his government yielded to necessity or entreaty, and his conception of the court was truer than that of any of its partisans. The failure of the armament proposals, and the fear that the Conference, contenting itself with the codification of the law of war, would otherwise do little for the cause of peace, aroused the leading delegates to renewed effort in order that the Conference should justify the name of a peace conference which public opinion had given it. Good offices and mediation were not strangers to international law; commissions of inquiry were familiar in international practice

<sup>1</sup> See Vol. II, pp. 165 and 533.

although adequate machinery and procedure were new; arbitration was a favorite means of settling international disputes. But adequate international machinery, namely, an international court for prospective litigation was lacking. Public opinion had demanded it for years and many projects had been drafted and urged for generations. The great book of Kamarowski, the project of the Interparliamentary Union elaborated at its Brussels session in 1895, and M. Descamps' address commending it to the powers, drawn up at the instance of the Union, were as familiar to students of International Law as to the pacifists, and public opinion was not only ripe but insistent.

Through the open windows of the House in the Woods the voice entered and from the House the permanent court sprang like Minerva fully armed from the head of Jove. Such is the theory; quite other is the fact. A permanent panel of judges was created from which litigant nations could select the five judges forming a temporary tribunal for the trial of a particular case. No permanent court was created, and the nations were as free after as before the Conference to appoint mixed commissions or to select judges of their own choice. But the fact remains that the creation of a permanent panel, from which capable and upright judges might be selected possessing the stamp of their country's approval, did provide a permanent personnel for the temporary tribunal, and the *idea*, although erroneous, that a permanent court actually was created by the Conference has perhaps done more to advance the cause of arbitration than any other single act in the world's history. A permanent court will be constituted at no distant date, and the so-called permanent court will be the point of departure.

Germany's objection to the project seems to have been that its establishment would reflect upon German sovereignty, because Germany could not be a party to a court for the trial of German cases before other than German judges or judges approved by Germany. The answer to this objection is that freedom to accept or reject recognizes sovereignty, and the consent to the establishment of a tribunal is itself an act of



sovereignty and the most signal recognition of its existence.

The objections of Germany were overcome and the court was established by universal consent, without a single dissenting voice and amid rejoicing and enthusiasm.

As previously shown the resort to the court is voluntary, and, as in the matter of general arbitration so in the case of the court, Germany has accepted the principle in practice as well as in theory.

#### 5. THE FIRST FOUR CASES DECIDED BY THE PERMANENT COURT

The efficiency of the Permanent Court has been tested four times, and the temporary tribunal has each time justified its existence and reflected credit upon the Convention of 1899. It is a source of pride that the Republics of the New World supplied the first case, and called into being for the first time the means whereby little by little the judicial settlement of international conflicts will replace the judicial combat of nations.

The case on trial was known as the "Pious Fund of the Californias." It originated in donations made by Spanish subjects during the latter part of the seventeenth and the first half of the eighteenth centuries for the spread of the Roman Catholic faith in the Californias. These gifts amounting approximately to \$1,700,000, were made in trust to the Society of Jesus for the execution of the pious wish of the founders. The Jesuits accepted the trust and discharged its duties until they were disabled from its further administration by their expulsion in 1767 from the Spanish dominions by the King of Spain and by the suppression of the order by the Pope in 1773. The Crown of Spain took possession of and administered the trust for the uses declared by the donors until Mexico, after her independence was achieved, succeeded to the administration of the trust. Finally, in 1842, President Santa Anna ordered the properties to be sold, that the proceeds thereof be incorporated into the national treasury, and that 6 per cent annual interest on the capitalization of the property should be paid and devoted to the carrying out of the intention of the donors in the conversion and civilization of the savages.

Upper California having been ceded to the United States in 1848 by the treaty of Guadalupe Hidalgo, the Mexican government refused to pay to the prelates of the Church in Upper California any share of the interest which accrued after the ratification of the treaty. The latter presented their claims therefor to the Department of State and requested the interposition of the government. A mixed commission for the settlement of the cross claims between the two governments was formed under the Convention of July 4, 1869. On the presentation and hearing of the claim the United States and Mexican commissioners divided in opinion. The case was accordingly referred to the umpire, Sir Edward Thornton, who rendered an award in favor of the United States for twenty-one annuities of \$43,050.99 each as the equitable proportion to which the prelates of Upper California were entitled of the interest accrued on the entire fund from the making of the treaty of peace down to February 2, 1869. The Mexican government paid the award, but, asserting that the claim was extinguished, refused to make any further payments of interest for the benefit of the Church in Upper California. Again the prelates appealed to the Department of State for support, and in 1898 active diplomatic discussions between the two governments as to the merits of the claim were begun and carried forward until they culminated in a formal agreement to refer the case to the determination of The Hague Tribunal. Only two issues were presented by the protocol, namely:

1. Is the case, as a consequence of the decision of Sir Edward Thornton, within the governing principle of *res judicata*?
2. If not, is the claim just?

And the court was authorized to render whatever judgment might be found just and equitable.<sup>1</sup>

As judges the United States selected Professor de Martens of Russia and Sir Edward Fry of Great Britain; Mexico chose Dr. Asser and M. Savornin-Lohman of Holland, and they selected as President of the Court, Dr. Matzen of Denmark—all members of the Permanent Court.

The agent for the United States was Jackson H. Ralston, Esq., Washington, D. C., and William L. Penfield, Esq., Solicitor for the Department of State, from whom the statement of the cases is taken, was of counsel.

<sup>1</sup> William L. Penfield's Hague Court in the Pious Fund Arbitration, Report of the Lake Mohonk Conference on International Arbitration (1903), pp. 83-84.

The material part of the unanimous award of the court in favor of the United States was as follows:

1. That the said claim of the United States of America for the benefit of the Archbishop of San Francisco and of the Bishop of Monterey is governed by the principle of *res judicata* by virtue of the arbitral sentence of Sir Edward Thornton, of November 11, 1875; amended by him October 24, 1876.

2. That conformably to this arbitral sentence, the Government of the Republic of the United Mexican States must pay to the Government of the United States of America the sum of \$1,420,682.67 Mexican, in money having legal currency in Mexico, within the period fixed by Article 10 of the protocol of Washington of May 22, 1902.

This sum of \$1,420,682.67 will totally extinguish the annuities accrued and not paid by the government of the Mexican Republic—that is to say, the annuity of \$43,050.99 Mexican from February 2, 1869, to February 2, 1902.

3. The Government of the Republic of the United Mexican States shall pay to the Government of the United States of America on February 2, 1903, and each following year on the same date of February 2, perpetually, the annuity of \$43,050.99 Mexican, in money having legal currency in Mexico.<sup>1</sup>

The action of the United States and Mexico saved the court, and in view of this the establishment of the important principle of *res judicata* in public law sinks into insignificance.

The second case has an importance of its own irrespective of the decision of the court, for Europe and Asia, represented respectively by Germany, France, Great Britain, and Japan, appealed to the court for the settlement of an international difficulty. The decision, concerning the question of perpetual leases of the European powers in the several foreign settlements of Japan incorporated with the respective Japanese communes, was as follows:

The provisions of the treaties and other engagements mentioned in the arbitration protocols not only exempt the lands held by virtue of the perpetual leases granted by the Japanese Government or in its name, but they exempt the lands and the buildings of every nature constructed or which may be con-

<sup>1</sup> Foreign Relations of the United States, 1902, Appendix II, 18. For the protocol and text of the award, see American Journal of International Law (1908), Vol. II, pp. 893-902.

structed on these lands from all imposts, taxes, charges, contributions or conditions whatsoever other than those expressly stipulated in the leases in question.<sup>1</sup>

The judges of the court were M. G. Gram of Norway, umpire, M. Louis Renault of France representing the plaintiffs, Germany, France and Great Britain, and M. Motono the defendant Japan.

The third case was equally important as it brought Europe and America together as plaintiffs and defendants. The question arose out of the preferential treatment claimed by Germany, Great Britain and Italy as plaintiffs against Venezuela as defendant, as due them by virtue of the protocols of May 7, 1903.

The question as to whether or not Germany, Great Britain and Italy are entitled to preferential or separate treatment in the payment of their claims against Venezuela, and its decision shall be final.

Venezuela having agreed to set aside 30 per cent of the Customs Revenues of La Guayra and Puerto Cabello for the payment of the claims of all nations against Venezuela, the Tribunal at The Hague shall decide how the said revenues shall be divided between the Blockading Powers on the one hand and the other Creditor Powers on the other hand, and its decision shall be final.

If preferential or separate treatment is not given to the Blockading Powers, the Tribunal shall decide how the said revenue shall be distributed among all the Creditor Powers, and the Parties hereto agree that the Tribunal, in that case, shall consider, in connection with the payment of the claims out of the 30 per cent, any preference or pledges of revenues enjoyed by any of the Creditor Powers, and shall accordingly decide the question of distribution, so that no Power shall obtain preferential treatment, and its decision shall be final.<sup>2</sup>

The award of the Judges, M. Mouravieff, umpire, of Russia,

<sup>1</sup> Official Report issued by the Bureau International de la Cour Permanente d'Arbitrage, p. 49. For the protocol and text of the award, see American Journal of International Law (1908), Vol. II, pp. 911-921.

<sup>2</sup> Official report issued by the Bureau International de la Cour Permanente d'Arbitrage, p. 124-125; American Journal of International Law (1908), Vol. II, p. 905.



Dr. Lammasch of Austria-Hungary, and M. de Martens of Russia, was as follows:

1. Germany, Great Britain and Italy have a right to preferential treatment for the payment of their claims against Venezuela;
2. Venezuela having consented to put aside 30 per cent of the revenues of the Customs of La Guayra and Puerto Cabello for the payment of the claims of all nations against Venezuela, the three above named Powers have a right to preference in the payment of their claims by means of these 30 per cent of the receipts of the two Venezuelan Ports above mentioned;
3. Each Party to the litigation shall bear its own costs and an equal share of the costs of the Tribunal.<sup>1</sup>

This decision awarding a preference to the blockading powers in the customs of Venezuela has been criticised as a premium on force and war; but if war is legal, and if Venezuela consented to the preferential treatment although under pressure of war, the decision seems good in law, however questionable it may be in morals.

The importance of the decision as in the previous case lies beyond the immediate award because it showed the great powers that they might safely submit their claims to The Hague, and the recourse to The Hague bids fair to ripen into a habit.

The fourth and last case arose out of a difference of opinion between Great Britain and France as to the exact meaning of a declaration, dated March 10, 1862, between the litigant States by which they agreed to maintain the independence of Muscat. The exact difficulty arose from the issue

by the French Republic, to certain subjects of His Highness the Sultan of Muscat of papers authorizing them to fly the French flag, and also as to the nature of the privileges and immunities claimed by subjects of His Highness who are owners or masters of dhows and in possession of such papers or are members of the crew of such dhows and their families, especially as to the manner in which such privileges and immunities

<sup>1</sup> Official report issued by the Bureau International de la Cour Permanent d'Arbitrage, p. 128; American Journal of International Law (1908), Vol. II, pp. 907-911.

affect the jurisdiction of His Highness the Sultan over his said subjects.<sup>1</sup>

By a protocol signed October 13, 1904, between Great Britain and France it was agreed that the questions arising from the interpretation of the Declaration of March 10, 1862, should be arbitrated in accordance with Article 1 of the general treaty of arbitration concluded between the two countries on October 14, 1903—the first arbitration treaty it may be said in pursuance of Article 19 of the convention for the peaceful settlement of international disputes (1899).

The judges were Dr. Lammasch of Austria Hungary, umpire, Chief Justice Fuller, of the United States, Savornin-Lohman of Holland. The award was unanimous, holding that the action of France was not in violation of the territorial sovereignty, but limiting the right of France to authorize subjects of Muscat to fly the French flag.

The award is highly technical and devoid of general interest; but is important as a settlement of difficulties arising out of the interpretation of a treaty.<sup>2</sup>

The Hague Tribunal will shortly be called into being a fifth time, for France and Germany have agreed to submit to arbitration a controversy caused by the desertion and arrest, on September 25, 1908, of six foreigners from the French foreign legion in Morocco, and the alleged improper assistance furnished them by the German consul. The Tribunal is to meet at the Hague on May 1, 1909, and will be composed of M. de Hammarskjöld, umpire, and Messrs. Fry, Fusinato, Kriege and Renault.

A sixth case is in preparation, for Great Britain and the United States have agreed to submit to arbitration at The Hague the interpretation of the Convention of 1818 regulating fishing in Newfoundland waters.

<sup>1</sup> Official report issued by the Bureau International de la Cour Permanente d'Arbitrage, p. 53; American Journal of International Law (1908), Vol. II, p. 922.

<sup>2</sup> For text of the award, see American Journal of International Law (1908), Vol. II, pp. 923-928.

The court will pass upon this important question in the course of the year 1910, and will be composed as follows: Dr. Heinrich Lammasch, of Austro-Hungary, umpire; Dr. Luis M. Drago, of Argentine; Sir Charles Fitzpatrick, of Great Britain; George Gray, of the United States, and Savornin Lohman, of Holland.

The world is thus awakening to the fact that there is or easily may be a court at the Hague, and each case tried before this august tribunal is not only a tribute to the wisdom of the First Hague Conference but evidence that the world is learning the alphabet of righteousness and peace.

## CHAPTER VII

### COMPULSORY ARBITRATION AT THE CONFERENCE THE DECLARATION IN FAVOR OF COMPULSORY ARBITRATION

#### 1. DISTINCTION BETWEEN MEDIATION AND ARBITRATION

At the opening of the First Hague Conference, arbitration was a recognized and indeed common means of settling international differences which diplomacy had failed to adjust. It is not meant to suggest that arbitration as such has proved itself in the past to be a substitute for war because doubtless very few cases have been submitted to arbitration which, if left unsettled, would in themselves have provoked war. It is, however, safe to say that if these difficulties had been left outstanding they would have been a source of irritation so that it would have been easier for the powers either to drift into war, or, in a moment of excitement, rush to arms, if the sources of discontent settled by arbitration had not been eliminated from the field of international controversy. It is certainly within the mark to say that the Alabama claims, involving as they did both vital interests and honor would, if unsettled, have irritated, perhaps alienated, for many years Great Britain and the United States, and might in a moment of excitement and indignation have plunged the English-speaking world into a war of unspeakable horror. To have healed the wounds of the two nations, to have drawn them together in friendly intercourse, to have prevented, it may be, war, would alone justify the creation of arbitration even if it had not existed as a system. The settlement of these unfortunate and embarrassing claims shows the possibilities of the system and when public opinion is insistent that international disputes be submitted to



and adjusted by arbitration, sovereigns much more than taxpayers will be astonished to see how legal questions are necessarily involved in matters of honor and so-called vital interests.

Article 8 of the second Russian Circular dealt, it will be remembered, with the peaceful settlement of international conflicts and the consideration of this article was entrusted to the Third Commission organized under the presidency of M. Bourgeois, first delegate of France, with Baron d'Estournelles de Constant as secretary and Baron Descamps as reporter. Good offices and mediation supplement diplomatic negotiation and may succeed where diplomacy has failed to effect a settlement between the parties in conflict. Still there is a fundamental difference between good offices and mediation on the one hand and arbitration on the other; because good offices consist in the desire to terminate a conflict, mediation is at most a coöperation in such settlement, whereas arbitration is a decision of the very point in conflict by a stranger to the controversy. In other words, good offices and mediation are advice, arbitration is a judgment. The one does not exclude the other: arbitration may be a development of good offices and mediation, and may result directly from the other. These means of settling international conflicts are, however, distinct in theory and practice and should be so considered

These methods are often discussed as if they were practically the same, but in reality they are fundamentally different. Mediation is an advisory, arbitration a judicial, function. Mediation recommends, arbitration decides. While nations might for this reason accept mediation in various cases in which they might be unwilling or reluctant to arbitrate, it is also true that they have often settled by arbitration questions which mediation could not have adjusted.

It is, for example, hardly conceivable that the question of the Alabama claims could have been settled by mediation. The same thing may be said of many and indeed of most of the great number of boundary disputes that have been settled by arbitration. The importance of mediation as a form of amicable negotiation should not be minimized. The Congress of Paris of 1856, as well as the Congo Conference of 1884, made a declaration in favor of the practice of mediation; and a formal plan of mediation forms part of the convention lately adopted at The Hague

for the settlement of international disputes. Nevertheless, mediation is merely a diplomatic function and offers nothing new.

Arbitration, on the contrary, represents a principle as yet only occasionally acted upon, namely, the application of law and of judicial methods to the determination of disputes between nations. Its object is to displace war between nations as a means of obtaining national redress, by the judgments of international judicial tribunals; just as private war between individuals, as a means of obtaining personal redress, has, in consequence of the development of law and order in civilized states, been supplanted by the processes of municipal courts. In discussing the subject of arbitration we are therefore to exclude from consideration, except as a means to that end, mediation, good offices, or other forms of negotiation.<sup>1</sup>

## 2. COMPULSORY ARBITRATION AT THE FIRST PEACE CONFERENCE

The Russian government presented to the First Conference six articles which somewhat modified are the basis of the title of the first convention dealing with good offices and mediation. At the same time the Russian delegation submitted a series of articles dealing with international arbitration which were the subject of profound consideration and discussion, and would have been adopted, albeit in modified form, had it not been for the opposition of one great power—Germany. Without quoting directly these articles<sup>2</sup> it may be said that they recognized arbitration as the most efficacious and most equitable means of settling controversies of a legal nature and especially controversies concerning the interpretation and application of existing treaties (Article 7), in consequence of which the contracting powers agree to arbitrate such questions, provided vital interest and national honor of the parties be not involved (Article 8). And in case of such arbitration, each State is the sole judge whether or not the question should be submitted to arbitration, except the cases enumerated in the following article and in which the Signatory Powers consider arbitration as obligatory. (Article 9.) An examination

<sup>1</sup>Moore's International Law Digest, Vol. VII, p. 25.

<sup>2</sup> For text in full, see appendix, pp. 777-778.

of these three articles shows, therefore, that arbitration is recognized as the most efficacious and equitable means of settling an international dispute, and that the Powers agree to resort to it providing their vital interests and national honor be not involved. Inasmuch as each power is to decide whether or not its vital interests or national honor be involved, it follows that a request to arbitrate may receive the answer that the vital interests and national honor of the defendant, to use a private law term, are concerned, and as the defendant is solely competent to pass upon this matter the mere suggestion of vital interest and national honor by it amounts to a refusal. It also appears that even although the Powers agree to submit various questions to arbitration the plea of vital interest or national honor makes the submission voluntary. The Russian Government, however, was unwilling to leave matters as they stood, because sovereign and independent nations may resort to arbitration whenever they desire without a general treaty. The partisans of arbitration desired to pledge the nations in advance to arbitration, and, while leaving them the right to invoke vital interests or national honor, to obtain their consent to the arbitration of a variety of subjects in which vital interests or national honor cannot be said to be involved. In this way the powers would pledge themselves to arbitrate matters of law and disputes arising out of treaties in force, provided that in the opinion of one of the litigants its vital interest and national honor be not involved. This would be a recognition of the efficacy and equity of arbitration, and the application of a principle even on a small scale is infinitely better than its mere recognition without application. Therefore the project proposed by the Russian Government, however limited the field of compulsory arbitration might be, marked a great progress in the history of arbitration because if accepted by the Conference it became compulsory, and, if successful within its limited field, it would have as the inevitable consequence the renunciation of the reserves of vital interest and national honor in the overwhelming majority of cases, if not in all.

By reason of its importance Article 10 of the Russian project is set forth at length:

From and after the ratification of the present treaty by all the Signatory Powers, arbitration shall be obligatory in the following cases, so far as they do not affect vital interests or the national honor of the contracting States:

I. In the case of differences or conflicts regarding pecuniary damages suffered by a State or its citizens, in consequence of illegal or negligent action on the part of any State or the citizens of the latter.

II. In the case of disagreements or conflicts regarding the interpretation or application of treaties or conventions upon the following subjects:

1. Treaties concerning postal and telegraphic service and railways, as well as those having for their object the protection of submarine telegraphic cables; rules concerning the means of preventing collisions on the high seas; conventions concerning the navigation of international rivers and inter-oceanic canals.

2. Conventions concerning the protection of literary and artistic property, as well as industrial and proprietary rights (patents, trademarks, and commercial names); conventions regarding monetary affairs, weights, and measures; conventions regarding sanitary affairs and veterinary precautions and measures against the phylloxera.

3. Conventions regarding inheritances, extradition, and mutual juridical assistance.

4. Boundary conventions or treaties, so far as they concern purely technical, and not political, questions.

But, however sweeping Article 10 might seem, the Russian delegation evidently regarded it as a first step, because the next article provided that the cases mentioned might be enlarged by subsequent agreement between the signatories of the present act. (Article 11.) Lest there be any mistake as to the nature and extent of the obligation assumed by the Powers, Article 12 of the Russian proposal stated clearly and distinctly that, while it was desirable, and indeed recommended by the present act, all other international conflicts not specifically mentioned in Article 10 be submitted to arbitration, the resort to it, except in the specified cases, was to be voluntary and only to result from the free and untrammelled consent of the parties in controversy. These proposals were enforced by a long



and careful memorandum presented by the Russian government, in which the subject of arbitration was examined with great care and in great detail.<sup>1</sup>

It should be said before passing to the detailed examination of Article 10 that the Russian delegation considered it necessary to codify, in the light of experience as well as of theory, the rules and regulations of arbitral procedure, and it should also be mentioned that Sir Julian Pauncefote presented a project for the establishment of a permanent tribunal so that the recourse to arbitration might be facilitated. The articles of procedure presented by the Russian Government as well as Sir Julian Pauncefote's plan for the establishment of a permanent court served as the basis of the discussion, and, in modified form, were adopted, so that arbitration was given not merely a code of procedure but a tribunal in which the controversy when presented might be decided in accordance with law.

But to return to the project of arbitration presented by the Russian delegation. The declaration in favor of arbitration as the most efficacious and equitable method of settling international difficulties was accepted with but slight modification and no discussion. Article 8 reserving from arbitration vital interests and national honor was subjected to examination, and in reply to Mr. Asser, who questioned the advisability of the reservation, Dr. Zorn stated on behalf of Germany that he attached the greatest importance to the retention of this phrase; that it constituted in his eyes an essential guarantee, a condition indispensable to the adherence of his government to the decisions of the Conference. As a result of this declaration the reservations were maintained without further discussion.

Article 9, providing that the State in controversy is solely authorized to decide whether honor or vital interests be involved, was accepted with a slight verbal modification. The controversy centered about Article 10 which sought to make

<sup>1</sup> For the text in full, see Appendix, pp. 800-807.

arbitration compulsory in certain clearly defined categories, even although the States retained the right to plead vital interests or national honor. In regard to section 1 concerning pecuniary damages Sir Julian Pauncefote proposed that the balance of the article be omitted after the words "pecuniary damage," which motion was agreed to and the section as thus amended was unanimously adopted. Section 2 dealt with controversies arising from the interpretation or application of treaties and conventions mentioned in the four succeeding sections. In the first paragraph, Mr. Holls objected to compulsory arbitration of conventions relating to the navigation of international rivers and interoceanic canals, and after some discussion the paragraph was suppressed. As amended by Mr. Holls and modified in other unessential particulars the paragraph was adopted. Equally upon the motion of Mr. Holls, monetary conventions were eliminated from paragraph 2. With these modifications Article 10 was approved in first reading not merely in principle but as actually drafted.<sup>1</sup> At a subsequent meeting, the committee of examination decided to modify section 1, so that the question of liability of a government to damages would not be submitted to compulsory arbitration. In other words, arbitration would only be compulsory for the amount of the indemnity when the powers in controversy had admitted liability. As modified in this sense section 1 was adopted. Other changes of importance were suggested and the principle of Article 10 remained intact until the 14th session of the Committee of Examination held on July 4, 1899. A brief extract from the official minutes of that date will suffice to show the origin and nature of the opposition that proved fatal to compulsory arbitration at the First Conference.

Dr. Zorn proposes the suppression of Articles 9 and 10. The German Government is not in a position to accept compulsory arbitration. It admits that all existing Conventions in which arbitration is provided shall of course continue in

<sup>1</sup> Conférence Internationale de la Paix, 1899, part IV, Comité d'Examen, pp. 10-12.

force, for example, the Universal Postal Conventions, the Conventions relative to Railway transportations, the Mutual Conventions, etc.

The principle of compulsory arbitration shall be maintained in all cases when already adopted by special conventions. But Germany can go no farther and believes she has already done much by accepting the list of arbitrators and the Permanent Court.

Dr. Zorn hopes that unanimity which has so happily prevailed heretofore in the decisions of the committee shall not come to an end and that the great concessions previously made by him will be taken into account. He therefore suggests that the adopted wording be such as to afford equal preservation to the future and the existing conventions.<sup>1</sup>

As a result of much discussion Article 10 was abandoned, a draft proposed by M. Descamps was ultimately adopted and figures as Article 19 in the convention for the peaceful settlement of international disputes. This article which has unexpectedly been at once the source and cause of many treaties of arbitration is as follows:

Independently of general or private treaties expressly stipulating recourse to arbitration as obligatory on the Signatory Powers, these Powers reserve to themselves the right of concluding, either before the ratification of the present Act or later, new Agreements, general or private, with a view to extending obligatory arbitration to all cases which they may consider it possible to submit to it.<sup>2</sup>

The partisans of obligatory arbitration were, however, unwilling to accept the compromise without a statement of their position. It was therefore decided that Article 10 as finally drawn up should be retained in the minutes and mentioned in the report of the committee as expressing the opinion of the majority. Dr. Zorn admitted the right of each member to record his vote and added that he would be satisfied with a statement in M. Descamps' report to the Conference that

<sup>1</sup> Conférence Internationale de la Paix, 1899, part IV, Comité d'Examen, p. 56.

<sup>2</sup> Ibid., p. 56. The 14th session of the Comité d'Examen was devoted to the consideration of this interesting question (pp. 55-59).

many members of the committee, although favorable to the principle of obligatory arbitration, abandoned it in order to reach an accord.

The elimination of Article 10 would naturally affect the other articles of the Russian project because they were presented as a unit and depended upon the acceptance of Article 10. Therefore there would remain only Article 7 proclaiming arbitration to be the most efficacious and equitable means for the settlement of international difficulties, and the compromise article, reserving to the powers the right to conclude either before or after the ratification of the present act or subsequently thereto general or particular treaties enlarging the domain of international arbitration. Article 10, as drafted and accepted by the committee, before Dr. Zorn's refusal on the part of Germany to accept it is as follows:

Arbitration is compulsory among the high contracting parties in the following cases, in so far as they do not affect the vital interests or the national honor, of the nations in controversy:

I. Cases of disputes concerning the interpretation or application of the following named conventions:

1. Postal, telegraph and telephone conventions.
2. Conventions concerning the protection of submarine cables.
3. Conventions concerning railroads.
4. Conventions and regulations concerning the means of preventing collisions of ships at sea.
5. Conventions concerning the protection of literary and artistic property.
6. Conventions concerning the protection of industrial property (patents, trade-marks, and brands).
7. Conventions concerning the system of weights and measures.
8. Conventions concerning reciprocal gratuitous assistance of indigent sick.
9. Sanitary conventions, conventions concerning epizooties, the phylloxera, and other similar scourges.
10. Conventions concerning civil procedure.
11. Extradition conventions.
12. Boundary conventions in so far as they do not refer to purely technical and non-political questions.

II. Cases of disputes concerning pecuniary claims on account of injuries, when the principle of indemnity is recognized by the parties.



Opinions may well vary as to the value of this article. Count Nigra, an enthusiast of obligatory arbitration, stated that the cases of compulsory arbitration of Article 10 were in his eyes so miserable that it was not worth the trouble to talk of them, and that he would reject the enumeration as wholly insufficient. Mr. Holls also believed that the enumerated cases were of little importance. The president, M. Bourgeois, on the contrary believed them to be fundamental in the sense that they recognized not merely obligatory arbitration in the abstract but in the concrete.

It is difficult to reach a conclusion on this point, although the view of M. Bourgeois seems correct in itself and was approved by the overwhelming majority in the Second Conference. It is a fact that the cases enumerated in Article 10 were not of the kind likely to produce war and a settlement by arbitration was thus unlikely to preserve peace; but the submission of difficulties arising out of them to international arbitration would advance the cause of arbitration and thus make it more nearly and more worthy as a substitute for war. If nations contract the habit of resorting to arbitration, whether the difficulty be large or small, it is to be hoped that its results may so far justify themselves as to render a resort to arms more difficult if not more impracticable.

The defeat of compulsory arbitration in 1899, for it was a defeat, presaged an unexpected victory for the partisans of arbitration, who, taking advantage of both the letter and the spirit of Article 19, entered into negotiations which have firmly established arbitration as a certain and ready means of settling an international dispute before it reaches an acute stage or generates war-like feeling. France and Great Britain were pioneers in the movement, and the treaty of arbitration concluded by them on October 14, 1903, has served as the model of numerous subsequent treaties. It will be noted that the treaty states first, that the French republic and Great Britain were Signatory Powers of the convention for the pacific settlement of international disputes concluded at The Hague July 29, 1899; second, that by reason of Article 19 of this conven-

tion, the signatories reserve to themselves the conclusion of agreements in view of a recourse to arbitration in all cases which they judge capable of submission to it. The treaty therefore is not merely the direct outcome of the First Conference, but it is the first fruit of the compromise Article 19.

It will be further noted, and it is to this fact that the treaty owes its importance, that arbitration is regarded as compulsory, for France and Great Britain agree specifically that

differences of a judicial order, or relative to the interpretation of existing treaties between the two contracting parties, which may arise, and which it may not have been possible to settle by diplomacy, shall be submitted to the Permanent Court of Arbitration established by the convention of July 29, 1899, at The Hague, on condition, however, that neither the vital interests nor the independence or honor of the two contracting States, nor the interest of any State other than the two contracting States are involved.

By submitting the Muscat controversy to arbitration under the provisions of this treaty, France and Great Britain evidenced at once good faith and a belief in the efficacy of arbitration.

It will be observed that the domain of arbitration is very broad although limited by vital interests, independence and a new-comer, honor. It does not, however, follow that France and Great Britain exclude from arbitration questions involving vital interests, independence or honor, but they do not by the Treaty of October 14, 1903, enter into a present agreement to submit questions of that kind to arbitration. If they do not agree, they do not refuse: they leave the question open for subsequent consideration, and it is to be hoped that when an acute controversy arises between the Powers they will follow the reasonable example of Great Britain and the United States in submitting the Alabama claims to arbitration, claims which certainly involved the vital interests and the "honor" of the two countries, whatever this latter term may mean in public law. It will further appear from an examination of the treaty, that Article 2 specified the necessary preliminaries of arbitration, such as the

special undertaking determining clearly the subject of dispute (*compromis*), the extent of the arbitral powers, and the details to be observed in the constitution of the arbitral tribunal and the procedure.

And, finally, by Article 3, the treaty is limited to five years from the date of signature.<sup>1</sup>

### 3. COMPULSORY ARBITRATION AT THE SECOND CONFERENCE

The subject of arbitration made its formal appearance at the very opening of the Second Hague Conference, and the experience of the last few years, together with the participation of Latin America, convinced partisans of arbitration<sup>2</sup> that a general treaty of compulsory arbitration, with the reserves of independence, vital interests and honor, would be included in the Final Act of the Conference. An objection advanced by Germany in 1899 was that arbitration had not made sufficient progress and was not sufficiently understood in order to be adopted as a compulsory means of settling international disputes. The fact, however, that many nations had entered into general treaties of arbitration; that Germany itself had negotiated one treaty with Great Britain and another with the United States (although the latter was unfortunately not ratified by the Senate), added to the fact that the permanent court of arbitration had decided, amid general approval, four cases presented to it, in two of which Germany was a suitor, led to the reasonable belief that, as Germany had found the Permanent Court serviceable, it would confess its mistake of 1899 not only by accepting the principle of compulsory arbitration, but by negotiating a general treaty at the Second Conference. Had not Dr. Zorn, Germany's worthy representative in 1899 and a delegate to the Second Conference,

<sup>1</sup> See Appendix, pp. 807-814, for enumeration of the arbitration treaties concluded since 1899 in reliance upon Article 19, and an analysis of the various forms in which the *compromis* appears.

<sup>2</sup> See Arbitration in Latin-America (1907), a convenient and valuable little book published during the session of the Second Hague Conference, by Gonzalo De Quesada, delegate from Cuba, and dedicated to the President and members of the Conference.

expressed himself in an article published in the *Deutsche Revue* for November, 1906, in favor of compulsory arbitration?

The various categories (of Article 10 of the Russian proposal) were entirely unpolitical. They formed the subject of a long and interesting discussion, and the vote was unanimous for a group of subjects to be submitted to compulsory arbitration (see the enumeration in the official protocol, Vol. IV, pages 113, et seq.) and that a new Hague Conference would return to this subject is very probable. The question is also sufficiently understood to reach a decision, and, as far as the view of the uninitiated is concerned, *there appears to be no reason why Germany should maintain its former opposition to the subject. In special treaties this opposition has already been renounced on the part of Germany.*<sup>1</sup>

In addition to the experience of recent years, attention is called to a previous paragraph where the importance of Latin-America at the Conference is mentioned. The reason for this is at once apparent when it is recalled that Latin-America has at all times and with singular unanimity expressed itself in numerous special treaties and in general treaties, concluded at important conferences, in favor of arbitration as a means of settling international difficulties. For example, in the first Pan-American Conference of 1889-1890, held at Washington, a very careful treaty of arbitration was signed by the conference, although it failed of ratification by the contracting States.<sup>2</sup> At the second Pan-American Conference, held in the City of Mexico (1901-1902), a treaty for the arbitration of pecuniary claims was drawn up and has been ratified by a

<sup>1</sup> *Deutsche Revue*, November, 1906, p. 144.

<sup>2</sup> For an account of the First Pan-American Conference, see Quesada's *Arbitration in Latin-America*, pp. 15-43.

In his farewell address to the Conference Mr. Blaine said: "If in this closing hour, the Conference had but one deed to celebrate, we should dare call the world's attention to the deliberate, confident, solemn dedication of two great Continents to peace, and to prosperity which has the peace for its foundation. We hold up this new Magna Charta, which abolishes war and institutes arbitration between the American Republics, as the first and great fruit of the International American Conference."—Official report of the International American Conference, Vol. II, p. 1167; Quesada, *loc. cit.*, p. 37.



number of Powers, including the United States;<sup>1</sup> in 1906 the third Pan-American Conference, held at Rio de Janeiro, reaffirmed and urged the ratification of the treaty of pecuniary claims drafted by the preceding Conference at Mexico, and the Mexican delegate was instructed to present the treaty of pecuniary claims to the Second Hague Conference for its consideration. It is therefore sufficiently clear why the presence of Latin-America bode well for the cause of arbitration. Because Pan-America as a unit was pledged to the cause, it was felt that the great moral, as well as numerical support which arbitration would thus receive might well turn the scales in its favor.

In his address on June 22, 1907, opening the proceedings of the first commission, M. Bourgeois called attention to the progress made in arbitration since the first conference, stating that 33 treaties of arbitration had been concluded between the Signatory Powers, and expressed the hope that the Conference might be able to frame and adopt a general treaty of obligatory arbitration of a less pronounced type than those concluded between several of the contracting States.

He quoted Dr. Zorn's statement of 1899

when the permanent court is established and in working order, the opportune moment will come when, after individual experiences, we may enumerate cases of obligatory arbitration for all,

and asked if the opportune moment had not come.<sup>2</sup>

At the same time, M. de la Barra, of Mexico, presented the text of a treaty of compulsory arbitration of international differences consisting solely of pecuniary claims, negotiated by the Pan-American Conference at the city of Mexico, on January 30, 1902, by the plenipotentiaries of seventeen Amer-

<sup>1</sup> For the text of the treaty, see Official Report of the American Delegation to the Second International Conference of American States (Senate Document, No. 330, 57th Congress, 1st Session), pp. 139-143; Quesada, loc. cit., pp. 83-85.

<sup>2</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, First Commission, 1st session (June 22, 1907).

ican states and prolonged till the thirtieth of December 1912 by the unanimous vote of the nations represented at the Conference of Rio de Janeiro in 1906.<sup>1</sup>

It appears, therefore, that from the very first session of the First Commission of the Conference the question of compulsory arbitration was clearly and effectively presented by the President of the Commission, the indefatigable partisan in 1899 as in 1907, and by the Mexican delegation as representative of Pan-America. Dr. Zorn's prophecy of 1906 that the question would probably be considered by the Conference was thus realized in the largest measure, and with every prospect of success.

The desire of the Conference undoubtedly was to negotiate a general treaty of arbitration; for inasmuch as many States had bound themselves individually by special treaties to submit international difficulties to arbitration, it was felt possible to reach a general agreement by the terms of which the Powers represented at the Conference would, in a single convention, bind themselves collectively to do that which many had agreed to do individually in separate and special treaties. Thirty-three treaties of arbitration, concluded from 1899 to the date of the Conference, showed a strong and growing tendency in favor of arbitration. The arbitration convention concluded at Rio de Janeiro in 1906 showed the American continent as a unit in favor of a general treaty. It was admitted by the friends of arbitration that difficulties might arise, but it was felt that a fair and thorough discussion of them would suggest a solution, so that a general treaty of arbitration, less progressive it may be than some special and individual treaties concluded between nations whose faith in arbitration is as unshaken as it is extreme, would be the inevitable outcome of the Second Peace Conference at The Hague.

In the course of the discussion each nation represented confessed its faith in arbitration. The difficulty only arose when

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, Vol. II, First Commission, 1st Session, June 22, 1907.

a concrete question was presented. If, for example, it was proposed to arbitrate all conflicts of a legal nature, the objection was promptly made that the term *legal nature* was rather broad; that the dispute might involve political or economic questions. If a concrete case were taken, such as an agreement to submit pecuniary claims where the liability was admitted, some delegations objected that, while willing to conclude a special treaty to this effect with a particular country, they were unwilling to conclude a general treaty binding themselves to all the world. If it were sought to exclude from arbitration questions involving independence, vital interest, and honor, some nations, especially Germany, objected that the obligation thus assumed was illusory because the suggestion of the presence of any one of these three reservations might prevent arbitration.

Again, it was insisted that an agreement to submit all legal questions might involve the duty to submit to arbitration judgments of national courts, and that nations must be very careful of the decisions or judgments of their national tribunals lest a respect for municipal or national justice be lost. If it were stated that the effect of an arbitral decision should be limited to the future so as not to be retroactive, it was replied that a decision between two contracting parties could not bind the other signatories who had taken no part in the arbitration, and that a series of irreconcilable decisions would sow the seeds of future conflict and dissension. The mere statement of these objections shows the serious nature of the difficulty, but it is a difficulty inherent in arbitration, although it may be more marked in a general convention than in a special treaty concluded between two Powers.

#### 4. THE VARIOUS PROJECTS OF COMPULSORY ARBITRATION

To set forth at length and in detail the proceedings of the First Sub-Commission, the discussions of the Committee of Examination A, to which arbitration was referred, and the final discussions of the First Commission in plenary session,

would require a volume. It is therefore proposed in the present account to consider in brief but necessary detail the discussions indispensable to the negotiation of a general treaty of arbitration, and to exclude extraneous matters, which, though interesting and indeed valuable, are not necessary to understand the declaration concerning obligatory arbitration eventually adopted by the Conference.

In the first place, it may therefore be said that five different projects of general arbitration were presented to the Commission and that these projects served as the basis of discussion in commission as well as in the Committee of Examination. They are as follows:

1. Proposition of the United States of America.
2. Proposition of Servia.
3. Proposition of Portugal.
4. Proposition of Sweden.
5. Proposition of Brazil.

Numerous amendments were offered, numerous compromises suggested, but on examination it will be found that however original they nevertheless related to the five propositions.

The American proposition<sup>1</sup> as presented by Mr. Choate on July 18, 1907, represented the minimum requirement for a treaty of compulsory arbitration, namely, the submission of legal questions and controversies arising out of the interpretation and application of treaties and conventions; but that questions affecting third States, not parties to the controversy were excluded as also questions involving the independence, vital interests and honor of the contracting parties. Of these reserves the parties themselves were to be the sole judges. It is evident, therefore, from this brief summary that the project presented by the American delegation was practically the Franco-British treaty of 1903. The important and sole difference lay in the fact that a subsequent article of the American proj-

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, First Commission, Annex 20.



ect provided that the *compromis* should be framed in accordance with the laws and constitutions of the contracting States, a formula devised in order to safeguard the rights of the American Senate and generally the internal branch of the government, which, according to the constitution of the respective countries, may properly determine in last instance the question to be submitted. It will be recalled that the action of the American Senate in amending "special agreements" to read "special treaty" made the coöperation of the Senate necessary in the negotiation of the *compromis*, thus raising to the formality and dignity of a treaty that which might be and ordinarily is considered a matter of arbitral procedure for the foreign offices of the contracting countries. This article may appear superfluous, because it is clearly understood that any international agreement to be binding must be negotiated by the proper internal organ. If unnecessary or superfluous, its presence could only be objectionable in a formal or literal sense, but if it facilitated the acceptance of the treaty its presence would be amply justified. As will be seen, however, this clause was the subject of much criticism and it was only retained in the draft of the convention after much discussion and difficulty.

On behalf of Servia,<sup>1</sup> M. Milovanovitch stated in substance that stipulations determining the rights and duties between sovereign States should be clear and precise, and that therefore the Servian proposition enumerated and limited the cases to which obligatory arbitration extends. The negative formula of reserves concerning essential interests or the honor of the States should be rejected because too vague. This proposition embraced the differences which result from the interpretation or application of all international acts regulating commercial, economic, administrative and judicial relations among the States, as well as the settlement of pecuniary claims between the States, or between a State and the subject or citizen of

<sup>1</sup>La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, First Commission, Annex 18.

other States, provided, however, that in this latter category the national tribunals were not competent.

The proposition<sup>1</sup> presented by Portugal was expressly stated by the Delegation of that State to be the project of the Inter-parliamentary Union which was itself based upon Article 10 of the Russian project presented to the First Conference. Its essential characteristic is the renunciation by the signatory nations of reserves in certain, clearly determined categories of cases which the nations bind themselves to submit to arbitration. The authoritative interpretation of the project was made by the Marquis of Soveral on presenting his project at the fifth session of the Fifth Sub-Commission held on July 16, 1907.

On introducing the proposition of the Swedish Delegation, M. de Hammarskjöld stated that its intention was to render arbitration compulsory for questions of a legal nature and especially in questions of the interpretation and application of international conventions, provided that the controversies did not involve vital interests or independence. But the Swedish delegation believed it possible, and indeed advisable to submit to arbitration certain questions which did not involve questions of vital interest and independence, and, that by express agreement of the contracting parties, the right to invoke these reserves should be specifically renounced in the following enumerated categories: first, in cases of pecuniary claims when the principle of indemnity is admitted; second, in case of pecuniary claims involving the interpretation or application of conventions of all kinds between the parties in controversy; third, in case of pecuniary claims arising from acts of war, civil war or pacific blockade, the arrest of strangers or the seizure of their property; but that an agreement to submit these controversies to arbitration should not in any way prevent the parties from submitting other cases covered by existing special agreements or treaties of arbitration.<sup>2</sup>

<sup>1</sup>La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, First Commission, Annex 19.

<sup>2</sup>La Deuxième Conférence Internationale de la Paix, 1907, Vol. II. First Commission, Annex 22.

The Brazilian proposition<sup>1</sup> presented on the twenty-ninth day of July, 1907, reserved the right of the Signatory Powers to refuse arbitration until good offices or mediation as well as diplomacy had been tried and failed, and excluded from the domain of compulsory arbitration questions affecting the independence, territorial integrity, essential interests, internal laws and institutions as well as the interest of third powers. Further, in case of differences affecting the rights of inhabited territories arbitration should only be compulsory with the previous consent of the inhabitants interested in the controversy; that each party in interest had the right finally to decide whether the controversy involved its independence, territorial integrity, its essential interests or its institutions. The Brazilian delegation stated that the compulsory arbitration of controversies of a judicial nature or involving the interpretation of treaties should be prospective not retroactive, and, therefore, could not apply to controversies already pending. It will be noted that the Brazilian proposition confined arbitration within singularly narrow limits, and, as M. de Martens pointed out, would exclude many and important cases susceptible of arbitration and which had actually been arbitrated in recent years.<sup>2</sup>

Before passing to the general discussion, it should be said that the delegation of Greece declared itself favorable to the maintenance of the provisions of Article 16 of the Convention of July 29, 1899, but expressed the belief that special treaties concluded between the Powers are preferable to a general treaty which would be restricted, that is, less comprehensive and progressive than special treaties between two Powers. However, in case the Conference should prefer to take a step in

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, First Commission, Annex 23.

<sup>2</sup> The criticism of M. de Martens was even more pointed, for the Brazilian proposition would, in his judgment, "exclude most of the questions which have been the subject of fifty-five arbitral awards rendered in the course of the nineteenth century."—La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, p. 462.

advance and to conclude a general treaty, the Delegation called to the attention of the Conference the provisions of Article 10 of the propositions presented by the Russian Government on July 5, 1899, to the Third Commission of the First Conference. This project, it will be remembered, enumerated the cases which, as far as they did not concern vital interests and the honor of States, might be submitted to arbitration. The list comprehends, in addition to pecuniary claims when the principle of indemnity is recognized by the parties, differences concerning the interpretation or application of categories of general treaties. Article 10 was therefore printed as a proposition and as such presented to the commission.

It is thus seen that the Greek delegation expressed itself in favor of special treaties rather than a general convention. This view was the view of the German delegation and was presented with great force and fullness in an address by Baron Marschall von Bieberstein, delivered at the seventh session of the Sub-Commission, held on July 23, 1907. He stated that

a general arbitration clause which, between two nations, defines with sufficient clearness the rights and duties flowing therefrom, may be too vague and consequently inapplicable in a world treaty;

that the elasticity of the expressions used in the exceptions to compulsory arbitration, namely, "honor, vital interests and independence," was so great that in a treaty signed by a great number of countries it would inevitably lead to a difference of interpretation and to numerous disputes; that the right of each nation to invoke the reserves of honor, vital interests and independence was inconsistent with the idea of compulsory arbitration, especially so in countries where the decision is in the province of some legislative body. He was of opinion that the use of the word "compulsory" in a universal provision "binding in its form but not in substance" involved no greater compulsion than the wording of the Convention of 1899 to the effect that



arbitration is the most effective and at the same time the most equitable means of settling controversies.

As to those questions which did not concern honor or vital interests and to which compulsory arbitration could be applied without restriction, the Baron stated that, after ascertaining that arbitration could be established for them in a general agreement, it was necessary to bring such agreement within the scope of the conventions of a universal character which many of the Powers have signed, citing the postal and telegraphic conventions, etc.; that account must be taken of the fact that the uniformity of their application might be endangered by contradictory awards, and means devised of precluding such an eventuality. He called attention to the difficulty of providing in a general treaty a court competent to consider conventions relating to the rights and duties of governments and those determining the relations of their citizens or subjects, which come within the jurisdiction of the ordinary courts, and treaties concerning technical matters where the services of specialists would be required, which difficulties, he stated, did not exist in treaties concluded between the two nations concerned. He closed his address by stating that

we are ready to examine conscientiously and impartially the propositions which have already been made and those which may yet be presented on this subject.<sup>1</sup>

The attitude of Germany in favor of special conventions divided the Conference into two groups. The statement that Germany while criticising and rejecting the reserves of independence, vital interests and honor, would examine without *parti pris* lists of subjects led to a belief that an enumeration of subjects based upon the Portuguese proposition would be accepted.

It became evident during the course of the discussion in the

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, First commission, First Sub-Commission, 7th Session, July 23, 1907.

Committee of Examination A, to which the various projects were referred, that unanimity was out of the question; for Germany stated in positive and formal terms that, although it was a partisan of obligatory arbitration and would continue to conclude special treaties of arbitration in the future as in the past, it would not be a party to a general or world treaty; that the inability to reach an agreement meant that the subject was not ripe for agreement, and that it would be imprudent to attempt to resolve the question before its time, for in accepting, prematurely, compulsory arbitration, discord would be sown among the nations. The German delegation formulated its objection to the proposed convention in the following paragraphs:

Article 16b signifies that in disputes concerning the interpretation and application of a series of international treaties and conventions arbitration will be obligatory without any reservation. It has been impossible for the committee of examination to examine carefully the innumerable international stipulations which are contained in the list. And, nevertheless, to our mind, such an examination would have been indispensable.

We have pointed out certain grave objections which would not fail to appear:

1. Contradictory arbitral sentences concerning interpretation of universal treaties will menace even the existence of these treaties;

2. Arbitral sentences which are contrary to the judicial decisions of the national tribunals called upon to interpret and apply the international treaties would create an impossible situation;

3. Arbitral sentences requiring that a State should modify its legislation in virtue of an international treaty might provoke serious conflicts with legislative bodies.

None of these questions have been decided in the drafting committee.

The German Government is disposed to insert in international treaties where proper the obligatory *compromis* clause for stipulations which allow of it, but it could not undertake in a world treaty engagements whose extent and effect it is absolutely impossible to foresee.<sup>1</sup>

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, p. 476.

Austria-Hungary, which had favorably considered the negotiation of a general treaty, wavered and eventually opposed it.

Italy, which had the distinction of negotiating more treaties of arbitration than any other Power, began to doubt the expediency of a general treaty in the presence of the opposition of Germany and Austria-Hungary. The Triple Alliance was evidently as binding in 1907 as in 1899.<sup>1</sup>

Belgium, Switzerland, Greece and Roumania opposed the draft treaty adopted by the committee, and it was known that some delegations not represented in the committee would in commission vote against the draft. Austria-Hungary therefore proposed and supported by argument a proposition, which, relegating arbitration to the future, bound the Powers to communicate at some future time the lists of subjects which they would be willing to arbitrate without reserve.

After having conscientiously weighed the question of arbitration, the Conference has ended by convincing itself that certain matters rigorously determined were susceptible of being submitted to obligatory arbitration without any restrictions and that it is exactly the disputes similar to these matters and especially the interpretation or application of certain international conventions—or parts of conventions—which lend themselves most especially to this means of solution.

The greater part of the matters in question being of a more or less technical character, every decision on the extent and the conditions under which the institution of obligatory recourse

<sup>1</sup>There are also signs that the German Emperor is influencing the minds of his allies—the sovereigns of Austria, Italy, Turkey, and Roumania—leading them to oppose it [arbitration].—Andrew D. White's *Autobiography*, Vol. II, p. 294.

There seems no longer any doubt that the German Emperor is opposing arbitration, and, indeed, the whole work of the Conference, and that he will insist on his main allies, Austria and Italy, going with him. Count Nigra, who is personally devoted to arbitration, allowed this in talking with Dr. Holls.—*Ibid.*, p. 298.

Count Nigra expressed himself to me as personally most earnestly in favor of arbitration, but it was clear that his position was complicated by the relations of his country to Germany as one of the Triple Alliance; and the same difficulty was observable in the case of Count Welsersheimb, the representative of Austria, the third ally in the combination of which Germany is the head.—*Ibid.*, p. 300.

to arbitration might be introduced, should, however, be preceded by a study which, in so far as it requires very special knowledge and experience, is beyond the competence of the Conference and could only be confided to experts. The Conference therefore invites the governments, after the close of the meeting at The Hague, to submit to serious examination and profound study the question of obligatory arbitration. This study shall terminate at . . . , at which date the powers represented at the Second Hague Conference shall notify each other, by means of the Royal Government of the Netherlands, the matters which they are ready to make the subject of obligatory arbitration.<sup>1</sup>

It should be said that the delegation of Switzerland presented a project which in a larger or lesser extent served as the basis for the modified British and American propositions.<sup>2</sup>

Count Tornielli had likewise made a proposition of a conciliatory nature provided the draft of the committee should not be adopted by the commission. He did not, however, request a vote in the committee, but reserved his right to bring the text to the formal notice of the commission. The Italian proposition is as follows:

The Signatory Powers assert that the principle of obligatory arbitration is applicable to disputes which have not been settled by diplomatic means, and which concern legal questions and above all question of interpretation or application of international conventions.

They agree consequently to submit the application of obligatory arbitration to a profound study as soon as possible. This study shall be concluded by the thirty-first of December, 1908, at which date, and even before, the Powers represented at the Second Hague Conference will notify each other, by means of the Royal Government of the Netherlands, the subjects which they are ready to make the subject of obligatory arbitration.<sup>3</sup>

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, pp. 482-483.

<sup>2</sup> Ibid., pp. 478, 489-490.

<sup>3</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, p. 495.



## 5. DISCUSSION IN THE COMMITTEE OF EXAMINATION A

An analysis of the discussions in the Committee of Examination shows that they are susceptible of a twofold division: First, those concerning arbitration in general, and, second, those concerning the immediate propositions presented for eventual adoption by the Conference in conventional form. For the sake of clearness, it seems advisable to consider the first group, and then pass in review the various articles and propositions which ultimately resulted in a formal convention submitted to the First Commission.

First. M. Asser called attention to the fact that several of the cases enumerated in the Portuguese proposition were susceptible of judicial treatment by national tribunals and that the relation of the judgments of the national courts to arbitral decisions would have to be carefully considered. M. Lammasch recognized that the subject was one of great delicacy and that a clause like the following would, if adopted, obviate the difficulty referred to:

It is understood that in the cases enumerated . . . the tribunal of arbitration shall not be competent to reform or to invalidate decisions of courts of justice of the contracting Powers, but that its rôle should be directly limited to the interpretation of the conventional provision in dispute. However, this interpretation would serve to guide the authorities of the Powers between which arbitration arose in the future application of the provision in question.

Second. In the next place Baron Marschall called attention to the fact that very often treaties contain provisions which oblige one or the other country to take certain administrative or legislative action; that administrative action was not likely to cause difficulty, but that the necessity for legislative action might expose a State to great inconvenience, because an arbitral decision might require an act of the legislature to give full effect to the decision, and should the legislature refuse to pass the act, the international tension would be great, because the failure to do so would result in a seeming violation of an international duty.

Third. Attention was also called to the effect which the arbitral decision between two Powers might have upon all the Powers parties to the arbitration convention.

As these three questions were considered at great length and occupied the committee during several entire sessions, it is necessary to consider each in turn and at some length.

The question concerning judgments was referred to a sub-committee, composed of Messrs. Fusinato, Asser and de Merrey, which, in its report, proposed to limit the cases of obligatory arbitration to

differences concerning the interpretation or application of conventions concluded or to be concluded and enumerated hereinafter, *as far as they refer to engagements which can be directly executed by the Government or its administrative organs.*

It was explained that the language adopted was intended to exclude, by necessary implication, the submission to arbitration of international differences arising from treaties or conventions in all cases in which the national tribunals were competent. The clause in italics in the above paragraph gave rise to prolonged discussion in the committee. Eventually it took the form of an article worded as follows:

It is understood that conventional stipulations . . . shall be submitted to arbitration without reserve, as far as they refer to engagements which should be executed directly by the Governments or by their administrative organs.

This article, however, was objected to as defective, in that the effect of the arbitral decision to be reached was not defined. Sir Edward Fry and M. Milovanovitch proposed the following amendment:

It is understood that arbitral sentences, as far as they relate to questions entering within the competence of national justice, shall only have an interpretative value without any retroactive effect upon anterior judicial decisions.

This proposition was presented and adopted as a substitute for the preceding, although an analysis of the texts of both

articles shows that they deal with two different phases of the question and are not in terms inconsistent.

In regard to the second question, namely, the duty of a State to modify its legislation in order to give effect to an arbitral decision, it may be said, as was constantly said in the committee, that the difficulty is not inherent in a general treaty of arbitration; that it presents itself in the same form and with equal importance in any special treaty of arbitration concluded between any two Powers.

In regard to the third matter, namely, the effect of an arbitral judgment upon Powers other than those parties to the litigation, and, therefore, concluded by the judgment, it was suggested by M. Fusinato that the arbitral judgment, concerning the validity of interpretation of a convention, should have the same value as the convention itself, and ought to be equally observed, excluding therefrom private rights acquired before the delivery of the decision. When the arbitral judgment concerned the validity or interpretation of a convention between several States, the parties between whom the judgment is pronounced should be held to communicate immediately the text to the other contracting Parties; if three-quarters of the contracting States declare their acceptance of the interpretation, this interpretation should be obligatory for all. In the contrary case, the judgment would only have value between the litigant parties and only for the case as presented.

M. Asser called attention to the fact that Article 56 of the convention of July 29, 1899, shows that the members of the First Conference had considered the question. This article is as follows:

The awards shall be obligatory only upon the parties who have concluded the arbitration agreement. When there is a question of the interpretation of an agreement, entered into by other Powers besides the parties in litigation, the parties to the dispute shall notify the other Powers which have signed the agreement, of the special agreement which they have concluded. Each one of these Powers shall have the right to take part in the proceedings. If one or more among them avail

themselves of this permission, the interpretation in the judgment becomes obligatory upon them also.

He believed that a combination of this article with M. Fusinato's proposition would equitably, as well as legally, solve the difficulties indicated. The matter was referred to a sub-committee which reported the following text, which met with approval:

If all the Signatory States of one of the conventions enumerated above are parties to a litigation concerning the interpretation of a convention, the arbitral judgment shall have the same value as the convention itself and shall be equally observed.

If, on the contrary, the litigation arises only between several of the Signatory States, the parties in litigation shall promptly notify the Signatory Powers, which have the right to intervene in the suit.

The arbitral judgment thus pronounced shall be communicated by the parties to the controversy to the Signatory States which have not taken part in the litigation. If they accept unanimously the interpretation of the point in controversy, this interpretation shall be obligatory for all and shall have the same value as the convention itself. In the contrary case, the judgment shall only decide the case which has been the object of litigation.

It is understood that the present convention does not interfere with the clauses of arbitration already contained in existing treaties.

At a subsequent period, M. Fusinato proposed that the following four paragraphs be added to the third paragraph of the above by way of continuation and elaboration:

The procedure to be followed in recording adherence to the principle established by the award in the case contemplated in paragraph 3 of the preceding article, shall be as follows:

If it is a question of a convention establishing a union with a special bureau, the parties which have taken part in the proceedings shall transmit the text of the award to the special bureau through the nation within whose territory the bureau has its seat. The bureau shall word the text of the article of the convention in conformity with the award, and shall communicate it through the same channel to the Signatory Powers which have not taken part in the proceedings. If the latter unanimously accept the text of the article, the bureau shall draw up a record of such acceptance, a certified copy of which shall be transmitted to all the Signatory Powers.



Nations whose reply may not have reached the bureau within a year from the date of the communication made by the bureau, shall be considered to have given their consent.

If it is not a question of a convention establishing a union with a special bureau, the said functions of the special bureau shall be performed by the International Bureau of The Hague through the medium of the Government of the Netherlands.

It is strictly understood that the present stipulation in no wise affects arbitration clauses already contained in existing treaties.<sup>1</sup>

The proposition was approved by the committee, and the four paragraphs were added, thus concluding the subject under consideration.

The various paragraphs already quoted indicate the final views of the committee upon the questions of a general nature inherent in arbitration, whether it be general or special. The committee thereupon took up the various projects submitted in order to elaborate a convention for submission to the commission.

The American delegation presented, it will be remembered, a proposition embodying the usual formula of arbitration with the reserves of independence, vital interests and honor. As the committee preferred to consider a list of concrete cases in which the nations agreed in advance to renounce reserves and bind themselves to submit to arbitration without reserve, the American delegation took no part in the early discussion of the committee. At a later period, the delegation was authorized to accept lists without reserve, provided, however, that any cases presented should be subject to the ratification of the Senate of the United States and be binding upon the United States only after such ratification. In pursuance of the instruction referred to, a project for an arbitration treaty including lists was presented by the American delegation to serve as a basis for discussion. In this project, however, the usual reserves were maintained except for the concrete cases, and the right of the Senate to coöperate in the establishment of

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, p. 504.

the *compromis* was especially reserved. It should be said that the British delegation expressed its preference for the simple American formula both in the commission and in the committee, but seeing that the committee preferred the list of cases with renunciation of the reserves, Great Britain likewise presented a draft of treaty based upon the Portuguese or Interparliamentary project.

As the members of the committee only desired to make the renunciation for the concrete cases to be specified in the convention and to maintain the reserves in all other cases, Articles 1 and 2 of the American proposition were adopted by the committee as the first or introductory articles of the proposed convention. The third article of the Portuguese proposition required the renunciation of the reserves in disputes arising over treaties of commerce and navigation. Attention was called to the fact that commerce covered a very wide field, and that it might happen that many provisions of commercial treaties were of a political or economic rather than legal nature. The question was referred to a sub-committee for its consideration, and M. Hammarskjöld, on behalf of the committee, reported the following:

Obligatory arbitration, rejected for conventions of commerce and navigation whose domain is too vast and too complex, might be proposed for the interpretation of tariff conventions; clauses stipulating the right of strangers to exercise commercial navigation, either general or under certain restrictions; clauses relating to taxes required of merchant vessels (wharfage, lighthouse, pilotage), to duties and taxes involved in cases of general average or of shipwreck; clauses concerning the weighing and measuring vessels; clauses stipulating the assimilation of strangers to nationals in matters of taxes and imposts; clauses relating to the right of strangers to engage in commerce or industry, to exercise the liberal professions in case of direct concession or an assimilation to nationals; clauses stipulating the right of foreigners to acquire and possess property.<sup>1</sup>

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, p. 475.

The committee thereupon proceeded to consider the concrete cases presented in the various projects before it.

The British delegation proposed to separate the lists into two categories, the first to consist of those cases or subjects which were unanimously accepted. For the second category, a protocol was proposed which would enumerate, at one and the same time, the cases susceptible of arbitration and the names of the States signing the convention, as well as the conditions in which the new subjects might be added to the list. As the proposed convention was built up around Article 16 of the Convention of 1899, which provided for arbitration as the most equitable and the most efficacious means of settling international difficulties, the first two articles voted were termed 16a and 16b. According to the British plan, an article stipulating the existence of certain cases in which the reserves might be renounced would be 16c; the articles in which the reserves actually were renounced would be 16d, and the article referring to the additional objects susceptible of arbitration without reserve would be 16e. The proposition to annex the protocol was adopted in committee by 10 votes to 5 and 3 abstentions, and the protocol was adopted by a vote of 12 to 4 and 2 abstentions.

The American proposition provided that in each case the Signatory Powers shall frame a special agreement (*compromis*) in conformity with the constitutions and laws, respectively, of the Signatory Powers, determining clearly the object of the litigation, the extent of the Powers of the arbitrators, the procedure and the delays to be observed in constituting the arbitral tribunal. The matter of the *compromis* was discussed at great length both in the Committee of Examination and in the plenary commission. In introducing the American project in the first commission, Mr. Choate called attention to the necessity of the *compromis*, and reserved the right of the Senate to pass upon it.<sup>1</sup>

<sup>1</sup> Article III provides that, in each case that may arise a special agreement or protocol shall be concluded by the parties in conformity with the

The objection to the article providing the *compromis* was and is that the treaty of arbitration binds both parties to conclude the *compromis*; that by this treaty the foreign country in which the determination of the *compromis* is regarded as a matter of arbitral procedure is bound immediately to conclude the *compromis*, whereas, the United States is not bound until the proper branch of its Government shall have established it. The American delegation failed to understand how one nation could be bound and the other not; for the *compromis*, as determined by diplomatic negotiations, would be binding upon both or neither, and that the inequality referred to by the opponents of the insertion of the *compromis* was non-existent. This view of the article concerning the *compromis* raised great objections in committee and in commission, and seemed to furnish a strong argument against the negotiation of a general arbitration treaty. The article was however adopted.

The convention ultimately accepted by the committee was based upon the amended American and British proposition and was known as the Anglo-American project.

The committee of examination to which the various projects concerning compulsory arbitration were referred consisted of representatives of eighteen states, and it was agreed

constitution or laws of the respective parties determining precisely the subject of the litigation, the extent of the powers of the arbitrators and the procedure and details to be observed in whatever concerns the constitution of the arbitral tribunal.

The form of this article is rendered necessary by the constitutional needs of securing for every such agreement or protocol before it can become effective, the approval of some other department of the Government besides the one which signs the agreement as a part of the treaty-making power. For instance, in the United States, the Senate of the United States, and as is believed other departments of government in many other states.—Address of Mr. Choate before the First Sub-Commission of the First Commission, July 18, 1907.

The question of the *compromis* was elaborately discussed by another member of the American delegation, in the Committee of Examination A, 14th Session, August 31, 1907; in the Plenary Session of the First Commission, 7th Session, October 7, 1907. See also, La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, pp. 487-489.



that only those subjects of arbitration should be reported to the commission for its consideration which received an absolute majority of the States represented—that is, ten or more votes. Seven subjects received this vote and were referred for insertion in the article provisionally numbered 16d. The subjects thus accepted were: (1) gratuitous and reciprocal assistance of indigent sick (12-4-2 abstentions); (2) international protection of labor (12-4-2 abstentions); (3) means of preventing collisions on the seas (12-4-2 abstentions); (4) weights and measures (12-4-2 abstentions); (5) gauging of vessels (12-4-2 abstentions); (6) wages and effects of deceased sailors (12-4-2 abstentions); (7) protection of literary and artistic property (10-4-4 abstentions).<sup>1</sup>

#### 6. DISCUSSION IN COMMISSION

After weeks of labor and profound discussion, the Committee of Examination reported to the First Commission in plenary session a project based upon the various propositions of the United States, Great Britain and Portugal. The Portuguese project was, as previously stated, based upon Article 10 which had failed in 1899 and the project of the Interparliamentary Union. The amended American and British projects referred to the Portuguese project, and the convention presented to the First Commission was therefore the common project of the three delegations as amended and drafted by the Committee of Examination. In the commission, Baron Marschall von Bieberstein undertook the arduous duty of opposing the convention which it was the desire of the overwhelming majority of the Conference to negotiate, and in this difficult and thankless task he was ably assisted by M. de Merey, who had pre-

<sup>1</sup> Pecuniary claims involving the interpretation or application of conventions of all kinds between the parties in controversy received 8 for, 6 against and 4 abstentions. In commission it fared better, receiving 31 for, 8 against and 5 abstentions, and, as will appear later, was added to the proposed list in the project of convention as finally drafted and adopted by the commission.

For the successive steps by which agreement was reached in the committee and the votes on each proposition, see *La Conférence Internationale de la Paix*, 1907, *Actes et Documents*, Vol. I, pp. 474-510.

vously stated that Austria-Hungary would show by its vote that its support of obligatory arbitration was not Platonic. M. Beldiman of Roumania likewise opposed the convention with great force. The arguments of the opposition failed to change a vote or to modify a proposition. The project was defended skillfully by Mr. Choate, Sir Edward Fry, M. Drago, Messrs. Soveral and d'Oliviera on behalf of Portugal, and by M. Bourgeois as the living embodiment of compulsory arbitration. M. Renault defended it technically with great ability and felicity of expression, and his address in reply to the objections of Baron Marschall was in the opinion of not a few competent judges the ablest single address made at the Conference.

The discussion which the projected convention of arbitration underwent in plenary sessions of the First Commission was long and detailed. It was partly of a general nature, opposing the conclusion of a general arbitration treaty, and partly directed to particular articles of the project. It seems, therefore, inadvisable to set it forth at length because the objections to the conclusion of a general treaty were stated by Baron von Marschall von Bieberstein, and adopted by the opponents as the authoritative exposition of their opposition. Baron Marschall stated that, while he was an advocate of compulsory arbitration and applauded the arbitration treaty recently concluded between Italy and Argentine, the project of the committee was unacceptable for the reasons which he stated later; that there were two systems for putting compulsory arbitration into practice which he characterized as the individual system and the universal system; that according to the former each nation reserves the individual freedom of choosing the parties with whom it is to agree, the cases are defined and specified, those subjects which seem susceptible of arbitration are chosen and the details are adapted to those subjects; that with regard to disputes concerning the interpretation of treaties, the nations which have concluded them are the ones which insert therein the stipulations to arbitrate which may be done between two nations, between several,

and even between all the nations of the world when the treaty is of a universal character as in the case of the Postal Union. He then stated that he would uphold and defend two theses:

1. The conclusion of a treaty of compulsory arbitration is only possible by applying the individual system, whereas in the universal system the word "compulsory" will be but an honorary title the use of which will not cover the numberless defects of the legal obligation inherent in the system.

2. Progress toward the peaceful solution of international disputes can only be realized by means of individual treaties, while a universal treaty with its necessarily vague, elastic and general terms, will tend rather to engender fresh discord than to furnish a solution of the original difficulty.

Before discussing these propositions he took up the "table" to be kept at The Hague and in which there should be entered the subjects that the various States signified willingness to arbitrate. The registration would in itself constitute an obligation to arbitrate. He said that from a legal standpoint the table was unassailable, but that as a statesman he opposed the innovation because he considered it contradictory to the fundamental basis of arbitration, which was good understanding, and that to bar the choice of the contracting parties and conclude treaties in accordance with a rigid and inanimate table would be to eliminate this spirit which would be equivalent to destroying the ideal essence of arbitration. He then spoke as follows:

I will now take up the first fundamental articles of the treaty of compulsory, universal, and general arbitration.

Arbitration shall be compulsory in questions of a *legal* nature.

What is the meaning of this word? I have answered that it ought to preclude "political" matters. Now, it is absolutely impossible to establish, in a universal treaty, a line of demarcation between these two ideas. A question may be a legal one in one country and a political one in another. There are even some purely legal matters which become political the moment a litigation arises. One of our most eminent colleagues told us the other day on another occasion "that politics are the region of international law."

Is it desired to distinguish between "legal" questions and technical and economic ones? This would be likewise impossible. This shows that the word "legal" means everything and

means nothing, and when it comes to interpretation it is exactly the same. The question has been asked, who decides, in case of a difference, whether a question is a legal one or not? No answer. And nevertheless this word "legal" is the nail on which the whole system of compulsory arbitration, with its list and its table, has been hung. If this nail is not driven solidly, everything will fall to the ground.<sup>1</sup>

As regards the wording of the exceptions, to wit, "honor, independence and vital interest," I have already spoken of them in my first speech, and I explained that they have no significance in a world-wide treaty. It is true that the evil is palliated by the clause that each party shall decide itself as to the exception of which it has availed itself. Then the other evil arises that there is no longer any obligation. These two articles begin with the imperatives "Thou shalt" and end with the reassuring words "If thou wilt." However, there is a much more serious objection. From time immemorial one of the principal sources of international disputes has been ambiguous stipulations and badly worded paragraphs. Now, here we are preparing two articles which do not contain a single word to define distinctly and clearly the rights and duties resulting therefrom—two articles which fluctuate between the opposite extremes of compulsion and option, and it is desired to recommend these articles to the world as "the most effective means of settling international disputes." This is the definition of arbitration contained in the Convention of 1899.

I now come to *the list*, that is, to the enumeration of the points on which arbitration is compulsory without reservation, except, of course, the reservation which is inherent in the word "legal," the reservation with regard to the agreement to arbitrate, and that of the Constitution. It is not easy to examine the list, for it is constantly changing. I will therefore speak of all the lists collectively, not only of the list which is in force at the time being but also of those in reserve, particularly of the Portuguese list which was the first on the program. What strikes one is the harmless character of all the points. This is not a reproach. Even controversies of a minor nature may impair the relations between nations. But I doubt whether it is beneficial to insert in the list treaties which by their nature preclude any dispute. My imagination, for instance, is absolutely incapable of picturing to itself a controversy regarding the treaties on the admeasurement of vessels. In these treaties the contracting nations mutually agree to recognize the certificates of admeasurement. These are treaties which may be concluded or denounced, but the scope of which cannot give rise to discus-

<sup>1</sup> For table, see *La Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, pp. 542-543.*



sion. It is the same with "weights and measures," "estates of deceased sailors," and others.

However, there are other points in the lists which demand the most serious attention. There are some treaties which obligate the contracting nations to enact certain kinds of legislation, for instance the treaty on the "Protection of workmen." Suppose a controversy arises as to whether one of the nations has fulfilled this obligation. The question is arbitrated and the award requires the amendment of the law. How execute this award? It has been said that the approval of this Convention by the legislative authorities would give force of law to all awards rendered. If this is really the case, it will be very difficult to secure the approval of the Parliaments, which will hardly be disposed to accept as rivals in legislative matters future and unknown arbitrators the choice of whom will devolve on the executive of the nation. It has been said on the other hand that the amendment of the law as required by the award should be subjected to the votes of the Parliaments, but in case of a negative vote, would this amount to "*vis major*"? Jurisconsults have not agreed on the answer. Some have said "no" and others "yes." The question has met with no solution in the committee.

There are still graver problems in the list. We find therein a series of treaties whose interpretation and application belong exclusively to the national courts. These are the treaties regarding *private international law* in the general sense, copyrights, trade-marks, civil procedure, and private international law proper. Now, the jurisdiction which one nation exercises over the subjects of another nation may be contested as being contrary to the wording and the spirit of the treaty. What would be the effect of an arbitral award in such a case? Article 16f says that it will not have retroactive effect. This goes without saying. But the article adds that the award will have an "interpretative value." This means that the national courts will have to conform to it. Now, the courts will not accept the interpretation as authentic unless the award has the force of law. Here is the same problem, only graver, for it is a question of the prestige and authority of the national courts. It is desired to call upon two entirely separate jurisdictions to interpret the same matter, and the national courts, which are a permanent organization surrounded by every kind of guarantee, are asked to submit in future to the interpretation given by the arbitral court, which is a product of the moment and disappears after the award has been rendered. This is politically and legally impossible. If private international law which was almost unknown fifty years ago, continues to grow as rapidly as it has within the last two decades, it will become necessary some day to provide for a uniform application of the stipulations

relating thereto. It may then perhaps be decided to create a high international court, not of arbitration, but of appeal, exercising jurisdiction in matters relating to private international law with the same guarantees and the same powers as our supreme courts of justice. This idea is one for future consideration, but I mention it in order to bring out more clearly the impossibility of this article, which complicates the question instead of deciding it and runs the risk of grafting upon an international dispute, already existing, a national one between the various constitutional powers of the nation. I submit these considerations to the serious reflection of all political students.

I will now take up the agreement to arbitrate. This is another touchstone of the *compulsory character* of arbitration. In order to go to The Hague it is necessary to pass through a regularly closed door. We read on this door the inscription "Agreement to Arbitrate." There are two keys to the door, each of the parties at variance holding one. If they agree to open the door, they go through, but if not they return the way they came, and the controversy remains unsettled. The passage through this door and consequently the journey to The Hague are thus purely optional. The German delegation tried to give to so-called compulsory arbitration the character of a *pactum de contrahendo* (agreement to contract). For this purpose we desired to grant to one party the right to compel an agreement to arbitrate. We did not have the success hoped for and to my keen regret I saw fervent advocates of compulsory arbitration in the ranks of our adversaries. I can therefore but repeat what I said to the committee, namely, that in universal compulsory arbitration the obligation shows out plainly on the paper but disappears the minute it is to take effect. But this is not all. It may happen that the two parties have harmoniously concluded the agreement to arbitrate but suddenly find themselves in front of another barrier labeled "Constitution." The guardian of this barrier is a legislative body, which opens or shuts it at will and is not subject to any control by the government of the nation. As far as the party is concerned which is compelled by its constitution to pass through this barrier, the *vinculum juris* does not begin until the latter is passed, while for the other party it is created by the agreement to arbitrate. This is a curious solution of the matter. Much has been said in the Conference with regard to the equality of the Powers, and now we wish to establish a clause which sanctions a manifest inequality between the contracting Powers. I am not indulging in criticism; I am merely stating a fact.

Having thus gone through the whole project, I come to my conclusions. This project has a defect which, according to my experience, is the worst that can exist in laws or contracts,

namely, that of making promises which it cannot fulfill. It calls itself compulsory, but it is not. It boasts of constituting a step in advance, but it does nothing of the kind. It claims to be an effective means of settling international disputes, and in reality it foists upon our international law a series of problems of interpretation which will often be more difficult to settle than the original controversies and which will even be likely to embitter the latter. It is said that this project wins for the world the principle of compulsory arbitration. This is not so, for this principle has already been won in theory by the unanimous sentiments of the peoples and in practice by long and ever-increasing series of individual treaties. Germany, which still hesitated eight years ago, has concluded, on the basis of the individual system, treaties of compulsory arbitration in a general manner and on particular subjects. She will continue the same course in future. Today's vote will therefore not be on the question whether compulsory arbitration is to be adopted for the world or not, but whether we shall adhere to the individual system, which has stood its test, or introduce the universal system whose vitality is not yet proved. I shall vote against the latter proposition for the reasons which I have just stated.<sup>1</sup>

Of the many replies to Baron Marschall's criticism of the general treaty of arbitration three stand out in full relief, and, judging from the applause with which they were received, it is probable that the partisan of arbitration will accept them now as then as the ablest presentation of their views. I refer to the addresses of Messrs. Renault, Choate and Sir Edward Fry, and regret that I can only quote them in part.

In his opening remarks M. Renault asked:

Does the project of the committee really deserve all the reproaches which have been made against it?

After stating that a general arbitration treaty for certain classes of controversies was unanimously considered as possible, M. Renault then said:

The question is whether there is an insurmountable barrier between this system and the system which will extend arbitration to all the nations.

In propounding this question, I do not mean to say that such arbitration should be concluded on the same basis as with some

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, Plenary Session, First Commission, 4th Session, October 5, 1907.

particular nation. The engagement assumed may be more or less strict, without the system losing its reality.

If arbitration were proposed without any reservations, I realize the risk which might be run.

However, in the first place we only enter engagements with nations with which we have already concluded other conventions. The work of The Hague consists precisely in signing such conventions with a large number of nations. This shows that we deem them capable of understanding the conditions of an engagement as well as ourselves and of conforming thereto.

The question is whether we run a risk by consenting, in the first place, to be bound toward these nations in the manner prescribed in Article 16a, according to which disputes of a legal nature and especially such as relate to the interpretation of treaties shall be submitted to arbitration with certain *reservations*. The ardor of our contradictors has been exercised against the elasticity of these reservations, namely, honor, vital interests, and the nonlegal nature of the dispute, which it has been said are but so many pretexts to render the engagements illusory. This article may be summed up in two words: "Thou shalt" . . . . "If thou wilt."

Nevertheless these same reservations, these same terms, are used in texts which are worthy of some consideration.

The Convention of 1899 already speaks of questions of a "legal nature."

Since then, numerous special conventions have embodied the provisions of Article 16a, notably the Anglo-German general arbitration treaty of May, 1904. If these expressions have any meaning in special conventions concluded between two nations, why should they lose their natural sense and no longer mean anything at all because applied simultaneously to a larger number of nations?

Does all obligation cease to exist on account of these reservations? I presume, nevertheless, that in signing their arbitration treaty England and Germany meant to obligate themselves in some manner. The reality is this: we calculate to bind ourselves to the extent which our vital interests are not at stake. However much the obligation seems to be reduced, it still exists, and a country will look twice before claiming that there is a vital question where there is none.

It is in this sense that I understand the first two articles of the project.

Is this an empty and meaningless statement?

I do not think so. Of course, we do not naïvely pretend that we will avoid a war by means of arbitration understood in this manner and expressed in this form, but we shall accustom peoples gradually to subject their normal relations to legal rules.



It is something to settle petty international questions by justice instead of by force. If the more important questions are not submitted to arbitration, the little disputes arising in the daily life of nations will be. In this manner may be settled immediately slight controversies which often become embittered and aggravated. Above all, the habit will be thus acquired of resorting to arbitral justice and this habit can only be encouraged by increasing the number and importance of the cases to be settled in this manner.

I now come to the list and the table. It has been recognized that the basis of this latter is purely legal in character.

To be sure, it is a new system, but it is also a new thing to contract engagements with forty-five nations. We must not be frightened at innovations in this epoch of wireless telegraphy. This table is very ingenious, for it enables the cases of compulsory arbitration to be recorded automatically and indicates immediately and without search whether two nations are obligated toward one another in a given case.

As to the list, it has been criticised in one word, namely, that it is an "anodyne" list.

One of the cases embodied in this list is far from being insignificant, and M. Drago very clearly pointed out the practical importance of this case. It relates to the fixing of the amount of pecuniary indemnity when the responsibility of the debtor nation is recognized. Is it not natural that arbitration should be applied to difficulties of this kind, which, without jeopardizing any vital interest, require an equitable settlement?

It is true that, along with this case, there are some "anodyne" cases which might be joked about.

But this is explainable. The purpose is, as I have already stated, to regulate the relations of the daily life of peoples, and to accustom them to the use of arbitration first by means of cases of minor importance. If the habit is acquired, and the procedure seems convenient, the number of cases may be increased, and, perhaps, this increase may take place automatically.

With regard to certain cases on the list, the difficulties have been spoken of which would be caused by arbitral awards in the system of "universal unions."

"You will create a diversity of jurisprudence," it has been said, "and you will consequently bring about the dissolution of these unions."

In a word, it has been *supposed* that the arbitral awards would vary. This does not show a very high degree of confidence in the arbitrators. Why should they have a tendency to render contradictory awards? Why not trust to them? Uniformity of interpretation is just as probable if not more so in the case of arbitrators as in that of national judges.

I had always thought, on the contrary, that the employment of arbitration was especially appropriate in connection with the "universal unions." The fields covered by these unions being very vast, the interpretation given to them in one part of the world may be different from that given them in another. Are there not great reasons for restoring uniformity, and can this be accomplished by any more convenient method than arbitration? What would be the good of having established uniformity in the rules themselves if diversity prevailed in their application?

The answer to be given is that of the common law. The decision rendered is binding as between the parties, but between them only.

Moreover, the Convention of 1899 provides a means of facilitating uniformity. The nations not a party to the dispute are to be notified and may participate in the arbitration which takes place between two nations. If they do not participate, the award shall be binding only on the two parties.

Would this increase the confusion? I do not believe so. The arbitral award has a certain effect, and that is to insure a uniformity of interpretation between two nations. Without the arbitration, each one might have its own individual interpretation. The award therefore certainly enables an approach to be made to uniformity, and if it is not binding on all in all cases, it will at least have a certain moral effect on the parties and on jurisprudence, and this alone is better than nothing.

It has been thought to discern another inextricable difficulty in case of an arbitral award rendered on a question regarding which judicial decisions have already been rendered.

Might there not be in this case an impairment of the autonomy of the national courts?

In the first place, it appears certain, in common law, that the decision of a court cannot be modified retroactively. The only character that the arbitral award could have would be an interpretative one for the future. Could such a character as this endanger the authority of the national courts? I do not believe so. It often happens that in nations themselves *interpretative laws*, to which the courts of the nation must conform, are promulgated because of the existence of a jurisprudence which is considered to be contrary to the spirit of the law. May we not suppose that the same thing will have to be done in the case of a jurisprudence considered to be contrary to an international convention? The country whose citizens suffer from this jurisprudence will demand arbitration. The authentic interpretation will be given by the award and the necessary measures will have to be taken so that this interpretation may have the force of law in the future. Wherein would the prestige of the national courts be affected by this?

Baron von Marschall said that Germany thought of establishing in the future a court of justice whose decisions could quash those of the national courts. We shall have time to think the matter over. But I wonder whether the national courts will not then feel themselves more affected than with the present common law and the operation of compulsory arbitration as I have just explained it.

It has also been asked how the award would be executed in case the coöperation of the legislative body is necessary for its execution.

This is the general problem of the relations of international law with the constitutional law of the nations. Is it for us to ask here what method should be employed by a country in order to give force of law to an arbitral award?

As regards the question of the *agreement to arbitrate*, which is a problem of the same character, I have already had occasion to explain myself. If it were pretended that an agreement to arbitrate should be concluded only under conditions of absolute equality, I do not see many cases in which such an agreement could be reached. This could only be imagined to take place between absolute sovereigns, capable by themselves of assuming the engagement and executing it.

In the case of the majority of nations, there are always times when it is necessary to refer to some other Power than the one which contracted the engagement. The agreement to arbitrate, and the ratification and execution of the awards require, according to the various cases, the coöperation of a legislative body without which the engagement entered into by the executive is imperfect.

I will recall two celebrated cases in this connection. The first is that of the Treaty of May 8, 1871, for the settlement of the so-called "Alabama claims." The agreement to arbitrate, which was of capital importance in this case, had to be approved by the American Senate. In England, on the contrary, the Crown was able to sign it without referring to Parliament. But when it was necessary to execute the award of the Geneva court and pay the fifteen and a half million dollars the Crown could do nothing without the consent of the Houses. The execution of the award was therefore at the mercy of a parliamentary vote. There are thus always times when it is necessary to trust to the good faith of the other party, for in almost all countries it would be easy for the latter to elude the engagement by taking shelter behind the opposition of the legislative body.

Another no less convincing case is found in the arbitration which took place between the United States and France under the Monarchy of July. The French Government had con-



cluded with the United States a convention by virtue of which the sum of twenty-nine millions was to be paid to the United States. The convention had been ratified by the Crown without the consent of Parliament, which, according to the charter of 1830, was not required in such a case. When it was necessary to obtain the money, the Chamber of Deputies refused to give it to the Ministry. The Government by no means considered itself relieved from its obligation. A new Ministry was formed and the sum appropriated and paid.

These two facts show that there is danger that an obligation arising from an award or arbitration treaty may not be fulfilled. But must no obligation ever be undertaken because of this danger? If this is the case, no agreement should ever be made with any one on any subject.

It is pointed out that the United States Senate has refused to ratify certain arbitration treaties. This proves nothing. One is always free to conclude a contract or not, as one sees fit. It is necessary to find a case in which a contract entered into has not been fulfilled. To my knowledge there is no case of this kind in existence. As regards the question why the Washington Cabinet gave up concluding certain arbitration treaties in consequence of the demands of the Senate with regard to the agreement to arbitrate, this is a matter of national policy and is not up for our consideration.

What we must remember is that the arguments adduced with regard to the United States may apply to all constitutional countries.

Such are, gentlemen, the various reasons why I think that the project submitted to you deserves your approval.<sup>1</sup>

Mr. Choate accepted Mr. Renault's argument as conclusive of the law points involved. He therefore dealt with Baron Marschall's preference for individual or special treaties; his rejection of the general treaty and discovered the reason to be an unwillingness to renounce the use of force in controversies with certain unspecified nations:

If we yield to the suggestions of the First Delegate of Germany, it is absolutely necessary for us to limit ourselves to individual treaties with each other and to come to a dead stop at the very suggestion of a general mondial arbitration agreement. . . . Why cannot a nation which is ready to enter into an arbitration agreement or agreements as to certain subjects with twenty other States, come to a similar agreement with all

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, Plenary Session, First Commission, 5th Session, October 5, 1907.



the forty-five if such is the imperative desire of the nations? Let Germany answer the question. The rest of us are ready to conclude a general convention in this sense because we have absolute confidence, each of us, in all the other nations. We respect the equality of all the other Powers upon the basis upon which they are represented and on which they exercise suffrage in the Conference. We recognize by their conduct here, their equal manhood, intelligence, independence and good faith. There are really two questions here—one of confidence or good faith, and the other of a resort to force. . . .

We have learned much in the protracted labors of the Conference, but the best thing that we have learned is this confidence in each other, and how the nations who have united in its labors are entitled to equal credit for honest intention and good faith.

Now as to the question of the reservation of the right or the purpose to resort to force, which is the only other reason that I can conceive of for declining to join in a general arbitration agreement on the part of those who are ready to accomplish the same thing by individual treaties. The idea of the opposition, as I understand it, is that we should maintain our right to select our own company, and not be compelled to admit all the nations into a general agreement with us. But suppose you do agree with twenty nations and conclude such treaties with that limited number, either separately or jointly, what do you mean to do with regard to the twenty-five other nations whom you will have refused to admit into your charmed circle of arbitral accord? You must reserve, must you not, you must mean to reserve the right to resort to war against the twenty-five non-signatory States, when differences with them cannot be settled by diplomatic means? Those are the two alternative ways—arbitration or force. And if you will not agree to arbitration, it must be because you reserve the right, if not the intent, to resort to force with them. But, gentlemen, empires and kingdoms, as well as republics, must sooner or later yield to the imperative dictates of the public opinion of the world. Every power, great or small, must submit to the overwhelming supremacy of the public will, which has already declared and will hereafter declare, more and more urgently, that every unnecessary war is an unpardonable crime, and that every war is unnecessary when a resort to arbitration might have settled the dispute. These are the two alternatives between which the opponents of our project must finally choose. . . .

After the masterful discourse of M. Renault to which we have just listened, there remain very few points for me to make clear. Baron Marschall is of opinion that the term "questions of a juridical nature" is obscure. But, during the discussion

of the even more important projet relative to the establishment of the Cour de Justice Arbitrale, in which he was our cordial collaborer, this difficulty was not raised.

It may be at times difficult to distinguish a juridical question from a political question, but the difficulty is the same in the application of individual treaties as in that of a general treaty, and this objection, like almost all the others which Baron Marschall has raised, applies equally to both kinds of treaties.

Again it has been urged, in support of the position, that a nation may make a general treaty with twenty States and yet refuse to extend it to the forty-five, that the same difference arising between A and B may be of a juridical nature, and arising between C and D may bear a political character. Our projet contains in itself the reply to that objection. If, on the difference arising between A and B, the question is of a juridical character, the treaty by its very terms will apply. If the same question when it arises between C and D proves to be, as it is claimed that it may be, a political question, the very terms of the treaty will exclude it.

The only reason why M. Baron Marschall prefers individual treaties to a mondial treaty, is that the latter does not leave to each party the choice of its co-signataries. To this I answer: "The whole matter is one of mutual confidence and good faith. There is no other sanction for the execution of treaties. If we have not confidence one with another, why are we here?" There is no other rule among us than that of mutual good faith. That is the only compelling power which can restrain or enforce our conduct as nations. If we feel that we cannot trust each other that is a conclusive reason for refusing to enter into treaties of arbitration with the rest. If we can, it is our solemn duty to do so, and thereby substitute arbitration for war, as the world demands. . . .

If we begin now with a restricted number of obligatory arbitration cases, as our project proposes, there is no doubt that before the next Conference meets the number will be considerably augmented by additions under the article providing for a supplementary protocol. At the same time, it is clear that a mondial treaty will not prevent the Powers from continuing to conclude among themselves individual conventions of arbitration, under all of which the same inevitable necessity for a *compromis* will always recur. But in signing a mondial convention, does a nation renounce absolutely the choice between arbitration and force? If one of the parties should refuse to conclude the *compromis* or to execute the award, the other has always the same right of recourse to force, which it ever had if no treaty had been made. In that case the only question will be whether it will venture upon that extreme

remedy, in defiance of public opinion, or will have patience still, and make further amicable efforts to bring the adversary to reason. . . .

Mr. Choate then referred to and commented upon Baron Marschall's illustration drawn from the "closed door" and then continued as follows:

A sufficient reply has been given by M. Renault. It is not a question of knowing whether there are several keys, but whether the door is open or closed. From the moment when the arbitration treaty is concluded, each party is bound to unlock the door for both to pass through upon reasonable terms. One party cannot settle for the other what terms are reasonable and until both parties agree, the *compromis* is not settled and the door is not open, whether the settlement of the *compromis* and of the opening of the door depends on the Senate, an executive council, a parliament, a sovereign or any other administrative entity. Always, as I have so frequently insisted, it is a question of good faith of the action of the Government on either side, however that Government is constituted. Arbitration is concluded, not between two or more underlying administrations of government, but between the two States, between the two Powers, as distinct national entities, and the carrying out of every step is between them.

This atmosphere of mistrust or distrust, in which it has been sought to envelope the whole question, ought to be cleared away. It is the most noxious atmosphere in which international questions can be discussed in an international conference and it ought to give place to the mutual spirit of abiding confidence and good will. For the Government that I represent, I can best dispel it by a reference to our past, which answers more eloquently than any words of mine can do, all the objections that have been raised. During the last fifty years, the United States have, I believe, concluded as many treaties of arbitration as any other power, and never in one instance has it failed to conclude the *compromis* required by the treaty. From the moment the arbitration agreement has been entered into which required the *compromis*, it has regarded the making of it on reasonable terms as a national necessity and the imperative requirement of good faith. And should it continue as a nation for a thousand years to come, it will never fail to honor its engagements, and the Senate, in the future as in the past, will ever be ready to complete the *compromis* in the spirit that the treaty requires.<sup>1</sup>

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, Plenary Session, First Commission, 5th Session, October 5, 1907.



Sir Edward Fry was always listened to with marked attention, not merely because he worthily represented Great Britain, the mother of constitutional liberty, nor because of the simplicity, sincerity and absolute straightforwardness of his views and his speech, but because as an able lawyer and distinguished judge of the highest courts of his country, his utterances in matters of law were as convincing as they were authoritative. It was therefore peculiarly pleasing to learn from his lips that morality was higher than law, and that the *vinculum juris*, for which the German delegation showed a marked affection, did not control nations in their foreign relations. Sir Edward said in part:

1. Arbitration in all its forms derives its origin from the free consent of the Powers in dispute, and the only difference between so-called compulsory arbitration and optional arbitration consists in the circumstance that the consent is given in advance in the former case while in the latter it is given after the dispute arises. In either case it is only a question of a sovereign act on the part of the Powers at variance, which by no means affects the independence of these Powers any more than a contract concluded affects the independence of the contracting party.

National laws recognize the utility of an agreement made for the purpose of settling a difference and drawn up before the latter occurs, provided such agreement relates only to differences whose nature can be foreseen. Why cannot an international law follow the same course of development as a national law in this as well as in other cases?

2. I admit that it may be said, and not without reason, that in view of the reservations and the power of denunciation stipulated in the project, the compulsory character of the convention is not very pronounced and the *vinculum juris* may be broken without difficulty. But, I repeat, the nations of the world do not allow themselves to be guided solely by legal theories or bound by *vincula juris*, and I consider that the convention, however weak it may be from a legal standpoint, will nevertheless have a great moral value as an expression of the conscience of the civilized world.

A law made by a people is inseparably connected with the moral idea which inspired it. We cannot divorce the moral idea from the law which expresses it. It is certain that, just as a law which is not supported by universal consent can be of no utility, a moral idea gains by being embodied in a law. . . .<sup>1</sup>

<sup>1</sup>La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, Plenary Session, First Commission, 5th Session, October 5th, 1907.



It has been said that the project as presented was unshaken by the opposition, but it was modified in certain particulars by the commission. For example, 16f:

It is understood that arbitral sentences, so far as they relate to questions concerning the competence of national justice, shall only have an interpretative value, without any retroactive effect upon previous judicial decisions,

was stricken from the project. It will be recalled that this article had had a checkered career. The proposition of the Fusinato sub-committee was adopted by a vote of 9 to 3 in the committee of examination. At a later date the Servian amendment was proposed as an amendment to this and voted as a substitute although the two articles were not inconsistent. Some States were in favor of the article as originally presented by M. Fusinato, others were in favor of the article as adopted by the committee and proposed to the commission, while still others were opposed to the principle of the article in whatever form expressed. In a spirit of friendly compromise the article was withdrawn by its proposers. This seemed to open a point of attack so as to divide an otherwise compact majority, an opportunity taken advantage of by M. Beldiman on behalf of the opposition, who proposed that the article as originally drafted by M. Fusinato be retained in the convention. A long discussion ensued with the result that the article in its entirety was omitted by a vote of 23 to 8, and 12 abstentions.

Upon the motion of the American delegation the third paragraph of 16i was eliminated because it seemed inadvisable to bind a nation to an interpretation, merely because the nation did not reject, that is, maintained silence during the period of one year within which it was to express its opinion.<sup>1</sup>

Article 16k providing that the *compromis* should be framed in accordance with the laws and constitutions of the contracting States was the subject of much discussion in the Committee of Examination, and was objectionable not merely to opponents of compulsory arbitration but to some of its most pronounced friends. An effort was therefore made to eliminate the article,

<sup>1</sup> Article 16g of the final project.

but after a spirited debate it was retained by a vote of 26 to 7, with 9 abstentions.<sup>1</sup>

The committee excluded from arbitration controversies concerning extraterritorial rights. This provision was regarded as humiliating to China and the countries in which extraterritoriality exists. China therefore proposed that the article be suppressed. Sir Edward Fry, on the contrary, insisted that the article be maintained and stated that if it be eliminated Great Britain would exclude from arbitration extraterritorial questions in its ratification of the treaty. The article was, however, rejected by a large majority. Upon the announcement of the vote, the first delegate of China declared that the suppression of the article removed all objections on his part to the project as a whole and asked that his vote be recorded affirmatively on each of the previous articles. The British protocol providing for the insertion of additional subjects of compulsory arbitration was adopted without observation or vote.

It will be recalled that the Committee of Examination adopted by a majority vote a list of seven subjects which might safely be submitted to arbitration without invoking the reserves of independence, vital interest and honor. In the commission an eighth subject was added, namely, pecuniary claims for damages when the principle of indemnity is recognized by the parties.

The president of the Conference, M. de Nelidow, proposed that the Anglo-American project should form a separate convention, that is, that it be not included in the Convention of 1899 in the form of additional articles to Article 16. This motion was, after discussion, accepted without a vote.

The project of the Committee of Examination, slightly modified by the Commission, was, in translated form, as follows:

#### ARTICLE 16a

Differences of a legal nature and, primarily, those relating to the interpretation of treaties existing between two or more of the contracting nations, which may arise between them in

<sup>1</sup> Article 16h of the final project.

the future and which cannot be settled by diplomatic means, shall be submitted to arbitration, on condition, however, that they do not involve the vital interests, independence, or honor of either of the said nations, and that they do not affect the interests of other nations not concerned in the dispute.

#### ARTICLE 16b

It shall devolve upon each of the Signatory Powers to judge whether the difference which has arisen involves its vital interests, independence, or honor, and, consequently, is of such a nature as to be comprised among those which, according to the preceding article, are excepted from compulsory arbitration.

#### ARTICLE 16c

The high contracting parties recognize that certain of the differences contemplated in Article 16 are of a nature to be submitted to arbitration without the reservations mentioned in Article 16a.

#### ARTICLE 16d

Following out this idea, they agree to submit the following differences to arbitration:

I. Disputes concerning the interpretation and application of conventional stipulations relative to the following matters:

1. Reciprocal gratuitous aid to indigent sick.
2. International protection of workingmen.
3. Means of preventing collisions at sea.
4. Weights and measures.
5. Measurement of vessels.
6. Wages and estates of deceased sailors.
7. Protection of literary and artistic works.

II. Pecuniary claims on account of injuries, when the principle of indemnity is recognized by the parties.

#### ARTICLE 16e

The high contracting parties decide besides to annex to the present convention a protocol enumerating:

1. The other matters which appear to them to be susceptible at present of forming the subject of an arbitral stipulation without reserve;

2. The Powers which, on condition of reciprocity, undertake this engagement among themselves right now with regard to one or more of these matters.

The protocol shall also specify the conditions under which may be added the other matters recognized subsequently as capable of forming the subject of arbitral stipulations without

reserve, as well as the conditions under which the non-signatory Powers will be permitted to adhere to the present agreement.<sup>1</sup>

<sup>1</sup> *Protocol referred to in Article 16e of the British Proposition relating to Compulsory Arbitration*

#### ARTICLE 1

Each Power signing the present Protocol accepts arbitration without reserve for disputes concerning the interpretation and application of conventional stipulations relating to those of the matters enumerated in the annexed table which are indicated by the letter A in the column bearing its name. It declares to contract this engagement with respect to each of the other Signatory Powers whose reciprocity in this regard is indicated in the same manner in the table.

#### ARTICLE 2

Each Power shall always have the privilege of announcing its acceptance of the matters enumerated in the table and for which it has not previously accepted arbitration without reserve according to the provisions of the foregoing article. For this purpose it shall communicate with the Netherlands Government, which shall announce the acceptance to the International Bureau at The Hague. After having inscribed it in the table referred to in the foregoing article, the International Bureau shall at once communicate certified copies of the notification and of the table thus completed, to the Governments of all the Signatory Powers.

#### ARTICLE 3

Two or more of the Signatory Powers, acting in common accord, may besides address the Netherlands Government requesting it to inscribe in the table additional matters for which they are ready to accept arbitration without reserve in accordance with Article 1.

The inscription of these additional matters and the communication to the Governments of the Signatory Powers of the notification as well as of the corrected text of the table, shall take place in the manner provided in the foregoing article.

#### ARTICLE 4

The nonsignatory Powers shall be permitted to adhere to the present protocol by notifying the Netherlands Government of the matters inscribed in the table for which they are ready to accept arbitration without reserve in accordance with Article 1.—*La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, Plenary Session, First Commission, 5th Session, October 5, 1907.*



## ARTICLE 16f

If all the nations signing one of the conventions referred to in Articles 16c and 16d are parties to a dispute concerning the interpretation of the convention, the arbitral award shall have the same weight as the convention itself and shall be likewise observed.

If, on the contrary, the dispute arises only between certain ones of the Signatory Nations, the parties at variance shall notify in due time the Signatory Powers, which shall be entitled to take part in the proceedings.

The award shall be communicated to the Signatory Nations which have not taken part in the proceedings. If the latter declare unanimously in favor of accepting the interpretation of the point in dispute as given in the award, this interpretation shall be binding on all and shall have the same force as the convention itself. In the contrary case, the award shall have force only as between the parties at variance, or as regards the Powers which shall formally accept the decision of the arbitrators.

## ARTICLE 16g

The procedure to be followed in recording adhesions to the principle established by the award in the case contemplated in paragraph 3 of the preceding article, shall be as follows:

In case of a convention establishing a Union with a special bureau, the parties which have taken part in the suit shall transmit the text of the award to the special bureau through the medium of the nation in whose territory the bureau is located. The bureau shall word the text of the article of the convention in conformity with the award, and shall communicate it through the same channel to the Signatory Powers which have not taken part in the suit. If the latter unanimously accept the text of the article, the bureau shall draw up a record of such acceptance, of which a certified copy shall be transmitted to all the Signatory Nations.

If it is not a question of a convention establishing a Union with a special bureau, the said functions of the special bureau shall be performed, in this respect, by the International Bureau of The Hague through the medium of the Government of the Netherlands.

It is strictly understood that the present provision in no wise affects arbitration clauses already contained in existing treaties.

## ARTICLE 16h

In each particular case the Signatory Powers shall conclude a special act (agreement to arbitrate) in conformity with the respective constitutions or laws of the Signatory Powers, deter-

mining clearly the object of the litigation, the extent of the powers of the arbitrators, the procedure, and the periods to be observed as far as the constitution of the arbitral court is concerned.

#### ARTICLE 16i

It is understood that provisions regarding arbitration which appear in treaties already concluded or to be concluded shall remain in force.

#### ARTICLE 16k

The present convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

The ratification of each Signatory Power shall specify the cases enumerated in Article 16d in which the ratifying Power does not avail itself of the provisions of Article 16a.

A record of each ratification shall be drawn up, of which a certified copy shall be sent through diplomatic channels to all the Powers which were represented at the International Peace Conference at The Hague.

A Signatory Power may, at any time, deposit new ratifications comprising additional cases included in Article 16d.

#### ARTICLE 16l

Each of the Signatory Powers shall have the power to denounce the convention. This denunciation may be made either in such a way as to imply the total withdrawal of the denouncing Power from the convention, or so as to take effect only with respect to a Power designated by the denouncing Power.

This denunciation may likewise be made with regard to one or more of the cases enumerated in Article 16d or in the protocol referred to in Article 16e.

The convention shall continue to exist so long as it is not renounced.

A denunciation, whether general or with respect to a particular Power, shall not take effect until six months after notice thereof has been given in writing to The Netherlands Government and communicated immediately by the latter to all the other contracting Powers.

The vote upon the adoption of the project is interesting as showing that 32 delegations expressed themselves in favor of it, that only 9 opposed it, and that 3 abstained from voting in favor of or against it. The countries voting in favor of the convention were United States of America, Argentine Republic, Bolivia, Brazil, Chile, China, Colombia,

Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Guatemala, Haiti, Mexico, Nicaragua, Norway, Panama, Paraguay, The Netherlands, Peru, Persia, Portugal, Russia, Salvador, Servia, Siam, Sweden, Uruguay, and Venezuela. The nine against were: Germany, Austria-Hungary, Belgium, Bulgaria, Greece, Montenegro, Roumania, Switzerland, and Turkey; and the three abstentions were Italy, Japan and Luxembourg.

It follows, then, that the Anglo-American project for a treaty of compulsory arbitration was adopted in its entirety by the large majority of the Conference, namely, 32 votes for, 9 against, and 3 abstentions. It may be asked why the convention elaborated after weeks, indeed months, of reflection, and approved by a substantial majority of the commission, does not appear among the conventions enumerated in the Final Act? The answer is that the minority opposed to the convention insisted on the so-called unanimity or quasi-unanimity rule obtaining in diplomatic conferences, so that the unwillingness of the few prevented the wish of the many.

As M. Bourgeois aptly said: "We are here to unite, not to be counted," and, as it was evident that the project before the commission could not secure the unanimous approval of the delegations present, M. de Martens, in a broad-minded spirit of conciliation, introduced a project which he hoped might meet with the approval of the nations assembled.

In introducing the resolution, M. de Martens stated that he desired to place before the committee a statement of the actual situation regarding obligatory arbitration; that it was regrettable that no decision could be had upon a question where neither independence, honor nor vital interests was concerned; that he hoped to present some common ground of agreement by offering an article to replace the Anglo-American project, which could not be accepted unanimously, the new article to state not merely the failure of the Conference to arrive at a general agreement, but also the right of the majority to conclude a separate agreement if it desired.

## ARTICLE XVII

Because of the great difficulty of determining the extent and conditions under which recourse to obligatory arbitration might be recognized by unanimous vote of the Powers and in a universal treaty, the contracting Powers limit themselves to stating in the Additional Act, annexed to the present convention, the cases worthy of being taken into consideration according to the free judgment of the respective governments. This Additional Act shall only be obligatory upon the Powers which sign or adhere to it.

M. de Martens felt that such an article would not only show the exact status of the question, but at one and the same time indicate that some Powers were agreed upon a project of obligatory arbitration. The Additional Act referred to in the last sentence of Article XVII was as follows:

Considering that Article 16 (38) of the Convention of 1899 for the pacific settlement of international disputes asserts the agreement of the signatory Powers to that act that in legal questions, and especially in questions concerning the interpretation and application of international conventions, arbitration is recognized as the most efficacious and at the same time the most equitable means of regulating disputes which have not been settled by diplomatic means;

Considering that in legal questions which, according to the free judgment of the contracting Powers, do not concern their vital interests, independence or honor, arbitration should be considered obligatory;

Considering the usefulness of indicating henceforth the cases in which the above mentioned reserves are not allowed;

The signatory Powers of this Additional Act have agreed on the following provisions:

## ARTICLE 1

In this order of ideas, they agree to submit to arbitration without reserve the following matters: a, b, c, d, etc.

## ARTICLE 2

The signatory Powers bind themselves to ratify this Additional Act before January 1, 1909, and in the instrument of ratification, to indicate precisely the cases of disputes for which they accept compulsory arbitration.

In adopting this project, M. de Martens believed that the Conference would more nearly approach the desired goal, not



by modifying the position of either party, but by stating it.<sup>1</sup> The American delegation explained that the United States could not accept the Russian project because it did not contain the first two articles of the Anglo-American proposition. Our delegation wished to see established the principle of arbitration of legal questions and only consented to the enumeration of specific objects inasmuch as it seemed impossible to secure a general treaty of arbitration if specific cases were omitted, in which the reserves of the first two articles of the American proposition were to be renounced. The Russian proposition would have obliged the nations to arbitrate the specified cases, but would not have bound them to arbitrate generally. The proposition sacrificed arbitration in general to compulsory arbitration of certain specified cases of no vital importance. The American delegation, however, would have supported, as a compromise, M. de Martens' proposition, reserving the right of the Senate to approve and ratify the objects specified in the list, but as the minority, particularly Germany and Austria-Hungary, was likely to oppose M. de Martens' proposition as strenuously as it opposed the Anglo-American convention, it seemed inadvisable to renounce a convention already voted, and by an affirmative vote in favor of the Russian proposition to prolong a discussion certain to result in disagreement.

Inasmuch as M. de Martens had presented his proposition in the hope that it might be unanimously accepted, he withdrew it immediately upon the announcement of the vote (31 for, 5 against, and 8 abstentions). The commission thereupon passed to the consideration of the Austro-Hungarian resolution, which, it will be remembered, had received a majority in the Committee of Examination and was reported to the commission for its ultimate adoption in case the Anglo-American convention should be rejected.<sup>2</sup>

The resolution was opposed by Sir Edward Fry, who said

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents Vol. I, pp. 545-546.

<sup>2</sup> For the text of the Austro-Hungarian resolution, see *ante*, pp. 342-343.

that the Austro-Hungarian proposition was based upon the hope that it would satisfy everybody.

We have recently voted by a very large majority the Anglo-American declaration. M. de Merrey's proposition today is to deprive us of the results of this vote, to eliminate the list and to remit to future consideration the question of compulsory arbitration. I believe if we vote today the resolution of M. de Merrey we shall contradict ourselves. The vote of the Anglo-American proposition shows that there are nations which believe that they have sufficiently studied the question in order to conclude at the present moment a general treaty. Why remit them to future study?<sup>1</sup>

Mr. Choate opposed the Austro-Hungarian resolution with great force and reason in an elaborate argument, from which the following paragraphs are taken:

After having discussed for three months the subject which occupies our attention today, the commission has expressed its will by an overwhelming majority of 31 votes against 5 to 8—a majority of 4 or more to one—and has thereby declared emphatically in favor of obligatory arbitration. It has voted upon an entire series of articles, separately and all together and the same majority has stood steadfastly by its decision. The minority has been so feeble that one could almost count its number upon the fingers of a single hand, and now it is proposed to annul everything that we have done in the last three months, and it is said by the distinguished First Delegate of Austria that there is no alternative, that either we must accept the rule of absolute unanimity or the proposition which he has presented, which is absolutely contrary to the clearly manifested will of the commission, and is a fearful step backward from that which that will has so strongly expressed.

What conclusion would have to be drawn if we should accept the proposition of M. de Merrey? Why, that a single member of the Conference can prevent it from doing anything, and can nullify that which all the rest have succeeded in doing up to the present time. . . .

As to the merits of the proposition, can it possibly stand? Can five votes nullify the will of the thirty-one? That is not possible. Such a proposition cannot be sustained. By this decisive vote we have accepted the principle that we would submit to obligatory arbitration cases of a juridical order and especially those arising upon the interpretation of treaties. We

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, Plenary Session, First Commission, 9th Session, October 10, 1907.

have agreed, also, that the treaty should not apply in cases where national honor or the vital interests of either party were involved, and that each Power should have itself the right to determine for itself whether such was the case. We have further, voted a list of cases in which arbitration should be obligatory, waiving the honor clause, and finally we have agreed to the protocol proposed by the Delegation of Great Britain, which would enable subsequent subjects to be added to the list. There only remain some details for us to determine.

Now, behold, M. de Merely comes forward with his proposition which is directly contrary to all this, which nullifies it all, which undoes all that we have been doing since we first took up the project for consideration; and we are told that we must accept his proposition or nothing. He would have us remit to the Powers for further study a proposition on which we are all agreed. Surely, we have not come here for any such trivial purpose. We have come at the behest of our governments and the general call of the nations, to establish obligatory arbitration. It has not been our purpose to labor during three months to accomplish that end, and to annul it all at last at the suggestion of five dissenting Powers and destroy at one blow the result of all our work. And will the Governments succeed any better than we? Will they succeed as well as we? Have we not reached that approximate unanimity which justifies the carriage of this proposition one step further, and submitting it to the final decision of the Conference? . . . . .

Let us then, gentlemen, put to the vote of this Conference the proposition of the honorable delegate of Austria-Hungary, and let us see here whether those who thus far have constituted this great majority, on the one hand, wish to support their own action, or, on the other to accept the remarkable proposition of M. de Merely which utterly nullifies it. Let us occupy ourselves with that which is our own business and leave to the Conference the duty to give an answer to the question which has here been raised.

It has been said by the eminent President of the Conference that my proposition would impose the will of the majority upon the minority. That, gentlemen, is a clear misapprehension. I made no such claim. The claim is that when the vast majority of the Conference desire to establish the agreement for obligatory arbitration for those who will to enter in, and those who will not to stay out, they have the right to do so, and to do it under what M. Martens has so well described as "*le drapeau de la Conférence.*" But the contrary proposition, which M. de Merely and others have advocated, subjects not a great majority only, but the entire Conference but one, to the dominating and destructive will of that single one. Certainly there is neither justice, nor reason, nor common-sense in a proposition that

will bring about such an iniquitous result, and render any decisive action on any important question absolutely impossible.<sup>1</sup>

After much discussion, M. de Merey's resolution was put to vote and rejected by 24 against, to 14 for, and 6 abstentions.

## 7. DECLARATION IN FAVOR OF COMPULSORY ARBITRATION

At the announcement of this vote, Count Tornielli took occasion to exercise the right he had reserved to present a resolution to the consideration of the commission in the event that the Anglo-American proposition should not receive the unanimous or quasi-unanimous approval. He spoke as follows:

In the first part of September I had the honor to ask in Committee A that a proposition presented by the Italian delegation upon the subject of obligatory arbitration should be postponed until the time when the commission should have passed upon all the other propositions which might be presented.

The result of the last ballots convinces me that it would be an indiscretion to continue further the search for formulæ which could have no chance of reuniting the votes. Under these conditions I abandon the proposition which I had the honor to announce.

I am convinced that after the intense work of judicial analysis and profound criticism of the texts which has permitted us to improve and complete very seriously and to a large extent the work of the peaceful settlement of international disputes, our spirits are no longer prepared to renounce the objections which every new formula must meet.

It is not the time for great speeches.

There are, however, certain necessary statements.

I shall sum them up in three points.

The first—the most important—is that the Conference of 1907 has been unanimous in recognizing the principle of obligatory arbitration.

The second consists in affirming without contradiction, that in the great field of international relations forming the subject of the law of conventions between States, there are some without doubt which may be the subject of obligatory arbitration.

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, Vol. II, Plenary Session, First Commission, 9th Session, October 10, 1907.



The third statement for which I invoke your unanimous consent, is this: All the States in the world have worked here together for four months upon difficult, sometimes delicate, questions, learning not only to know one another better, but also to respect and love one another more.

The general spirit which has come from the contact of all these forces working together is a very high one. It is a commanding spectacle and an undeniable result. The differences of opinion between us have never passed the limit of judicial controversies and questions of detail.

Let us wisely stop there. We have run a good course. Let us be content with the work accomplished. Give it time to bring forth fruit.

If looking behind us, one of us feels some regret at seeing certain incomplete works, on turning our eyes to the future, we are all filled with confidence, no thought of discouragement invades our souls.<sup>1</sup>

Baron Marschall and M. de Merey declared that their delegations would support the resolution, and the president of the commission, Mr. Bourgeois, likewise associated himself "with the noble words pronounced by Count Tornielli," stating that they gave him occasion to reaffirm the points upon which a unanimous accord has been reached: first, the principle of obligatory arbitration, which failed in 1899, has received the unanimous approval in 1907; second, it is admitted by all that certain matters, notably those which relate to the interpretation of treaties, are susceptible to obligatory arbitration without any restriction; third, those who seem to differ upon the time when the engagement should be entered into regarding such matters are only separated by a question of delay and not by a question of principle. These three points, he said, "I have endeavored to call to the attention of the commission and in the name of the commission, I thank Count Tornielli for having confirmed them."<sup>2</sup> M. Bourgeois, thereupon suggested the appointment of representatives of the various views in order to find a formula which would adequately express the unani-

<sup>1</sup> La Deuxième Conférence de la Paix, Actes et Documents, 1907, Vol. I, pp. 549-550.

<sup>2</sup> La Deuxième Conférence Internationale de la Paix, 1907, Plenary Session, Vol. II, First Commission, 9th Session, October 10, 1907.

mous agreement. M. de Nelidow proposed the formation of a similar committee whose members should be chosen from among the representatives of the two opinions dividing the Conference, which committee would find an acceptable formula.

The resolution was reported in the tenth plenary session of the first commission, held October 11, 1907. The text is as follows:

The Commission, conforming to the spirit of mutual understanding and concession which is the very spirit of the Peace Conference, has resolved to present to the Conference the following declaration which, while reserving to each of the States represented the benefit of these votes, permits them all to affirm the principles which they consider unanimously recognized:

The commission is unanimous,

1. In recognizing the principle of obligatory arbitration;
2. In declaring that certain differences, and notably those relating to the interpretation and application of provisions of international conventions, are susceptible of being submitted to obligatory arbitration without any restriction.

It is unanimous finally in proclaiming that although it has not yet been found feasible to conclude a convention in this sense, nevertheless the divergences of opinion which have come to light have not exceeded the bounds of judicial controversy, and that, by working together here during the past four months all the countries of the world have learned not only to understand each other and to come together more closely, but have been able to put forth in the course of this long collaboration a very high sentiment for the common good of humanity.<sup>1</sup>

After various expressions in favor of the resolution, Mr. Choate declared the sober and measured view of the delegation of the United States:

Before the vote is taken upon the proposition which is now before the commission, I desire, on the part of the Delegation of the United States of America, to make a brief statement.

The principles which have guided our action in the past in the Conference and will control it in the vote upon the present proposition, are as follows:

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, Actes et Documents, 1907, Vol. I, p. 551.

The immediate results of the present Conference must be limited to a small part of the field which the more sanguine have hoped to see covered, but each successive Conference will make the positions reached in the preceding Conference its point of departure, and will bring to the consideration of further advances towards international agreement opinions affected by the acceptance and application of the previous agreements. Each Conference will inevitably make further progress and by successive steps results may be accomplished which have formerly appeared impossible.

We have kept always in mind the promotion of this continuous process through which the progressive development of international justice and peace may be carried on, and we are inclined to regard the work of this Second Conference not merely with reference to the definite results to be reached here, but also with reference to the foundations to be laid for further results in future Conferences. It may well be that among the most valuable services rendered to civilization by this Second Conference will be found the progress made in matters upon which the Delegates may reach no definite agreement.

We have carried the process of discussion upon the projet which we introduced and have advocated, and on which the commission has voted, as far as our instructions permit, which are to the effect that after reasonable discussion, if no agreement is reached, it is better to lay the subject aside or refer it to some future Conference in the hope that intermediate considerations may dispose of the objections.

After three months of earnest consideration and discussion the commission reached, before the introduction of the present proposition, by a majority of 4 to 1 of the entire membership of the Conference, the adoption of our projet for carrying the principle of obligatory arbitration into concrete and practical effect, by an agreement proposed to be entered into between nations who supported the projet, leaving it open for the rest to dissent or to adhere as they might afterwards be advised.

It would seem to have been the legitimate sequence of that action that the projet should be carried before the Conference and find its place in its final act. We therefore regard the present resolution as a very decided and serious retreat from the advanced position in favor of obligatory arbitration which the commission has already reached, and one which in our judgment cannot but seriously retard and imperil the progress of the cause of arbitration in general. We therefore cannot conscientiously, without an abandonment on our part of the principles for whose practical application we have so long contended, vote for the resolution now under consideration. Not because we do not favor the principle of obligatory arbitration, for it is that for which we have been from the beginning contending,

but because it is practically an abandonment by the commission of the advanced position which, by such a decisive vote, it had already reached, and I am therefore instructed by the Delegation to abstain on the present vote.<sup>1</sup>

The opposite view was expressed by Sir Edward Fry, who as joint author of the Anglo-American project, spoke with peculiar authority. He said:

I regret from the bottom of my heart that the project will not be presented to the Conference. I regret, equally, that the United States feels that it is not able to vote in favor of the declaration presented to us. I regard this declaration as a solemn acknowledgment of the progress already accomplished by the First Commission and not as an abandonment of its results.<sup>2</sup>

M. de Nelidow stated:

If I speak it is not to continue the discussion, but in this very moment the success of the Conference is at stake. It is unfortunately evident that it has not been able and was never able to establish by a unanimous vote the desire of the great majority, but we must finish and we can only finish by reciprocal concessions. I therefore appeal to your good-will in order that it may not be said that we were incapable of reaching unanimity upon this important subject of our deliberations.<sup>3</sup>

The declaration was thereupon put to vote and was unanimously accepted with four abstentions: United States, Haiti, Japan, and Turkey.<sup>4</sup> The result was received with great and continued applause, for it seemed to the majority of the Conference that something had indeed been accomplished, even although the Anglo-American convention was buried from the sight of man.

The Austro-Hungarian resolution gave rise to a keen and, one might say, acrimonious discussion as to whether the proposition voted by a large and overwhelming majority of the Conference should be included in the Final Act as the act of the

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, Plenary Session, First Commission, 10th Session, October 10, 1907.

<sup>2</sup> Ibid., 10th Session, October 10, 1907.

<sup>3</sup> Ibid., 10th Session, October 11, 1907.

<sup>4</sup> Ibid., 10th Session, October 10, 1907.



Conference, or whether the opposition of the few recalcitrant delegates could prevent the inclusion of a project in the Final Act. The opponents of arbitration insisted that the majority was not free in the Conference to force the will of the majority upon the minority, that it was a diplomatic conference not a parliament. Mr. Choate insisted that the majority did not seek to force anything upon the minority, but that the majority wished to conclude a convention to bind those who voted for it, and to leave the question of ultimate adherence to this convention open to those who opposed it at present. Mr. Choate further insisted that the minority should not impose its wish upon the majority, and the simple question was whether a desire of one may prevent the expressed wish of all. Mr. Choate then recalled the precedents of 1899 in which the declaration forbidding the use of dum-dum bullets was included in the Final Act, although Great Britain and the United States voted against it, and he referred to the action of the present Conference in adopting the prize court convention against the negative vote of Brazil. It should be said, however, that none of these Powers objected to the negotiation and insertion of the various projects in the Final Act, whereas the present minority did. M. de Martens and Baron Marschall declared that the principle of unanimity is essential to international conferences. For example, Baron Marschall declared that his delegation, in conformity with the admitted usage in international conferences, could not accept the principle announced by the first delegate of the United States of America, that the majority decides and the minority ought to yield; concluding with the statement "that this principle would endanger all international conferences."

The Conference took no action upon this grave and delicate question, but it is believed that the large, even the overwhelming majority was in favor of the requirement of unanimity in important matters.

Deliberations extending over a period of three months resulted in the defeat of a definite, carefully-considered project for a general treaty of arbitration. It can not be said,

however, that the time was wasted. The deliberations of the First Commission, of the Committee of Examination, and of the Commission in Plenary Session, will be of great value to any subsequent Conference, or indeed in any subsequent consideration of the subject, and, although the convention failed of adoption, the principle of obligatory arbitration was unanimously admitted. It is, therefore, improbable that any nation or collection of nations will hereafter hold a brief against compulsory arbitration.

## CHAPTER VIII

### THE CONVENTION RESPECTING THE LIMITATION OF THE EMPLOYMENT OF FORCE IN THE RECOVERY OF CONTRACT DEBTS<sup>1</sup>

The failure to negotiate a general treaty of arbitration in which nations pledged themselves in advance to arbitrate, subject to the reserves of independence, vital interests and honor, legal questions and controversies arising out of the interpretation of treaties and conventions seemed to many within and most without the Conference a setback to the cause of arbitration. The refusal of a handful of States to pledge themselves to arbitrate without reserve certain specified cases in which independence, vital interests and honor could not be involved, seemed not merely a setback but an indication that compulsory arbitration of unimportant, not to say insignificant, questions is impossible or inexpedient in the present status of international development. The declaration in favor of obligatory arbitration, the statement that legal questions and controversies arising out of the interpretation of treaties and conventions might be arbitrated without reserve, was looked upon as the acceptance of a principle

<sup>1</sup>The reader is referred to the following articles on the subject of the forcible collection of contract debts: George Winfield Scott's *International Law and the Drago Doctrine*, *North American Review*, October (1906), pp. 602-610; George Winfield Scott's *Hague Convention Restricting the Use of Force to Recover Contract Claims*, *American Journal of International Law* (1908), Vol. II, pp. 78-94; Amos S. Hershey's *Calvo and Drago Doctrines*, *ibid.*, Vol. I, pp. 26-45; Crammond Kennedy's *Is the Forcible Collection of Contract Debts in the Interest of International Justice and Peace*, *Proceedings of the American Society of International Law* (1907), pp. 100-124; Luis M. Drago's *State Loans in their Relation to International Policy*, *American Journal of International Law* (1907), Vol. I, pp. 692-726.

See also Moulin's *La Doctrine de Drago* (1908).

with a distinct understanding that it be not put into practice. Yet the powers represented at the Conference bound themselves to arbitrate controversies arising out of contract debts, and specifically renounced the use of force, provided the debtor State agree to arbitrate the question in controversy, should actually arbitrate it and give effect to the award of the Court of Arbitration. It is impossible to overestimate the importance of this convention, because in its very introductory phrase the powers recognize that arbitration is a substitute for force; that, if arbitration be had, force is unnecessary and therefore is specifically renounced by the convention. This declaration, therefore, shows that arbitration is, as its partisans have always maintained, an instrument of peace, and in adopting and proclaiming the principle the Conference, however unconsciously, took a concrete step toward disarmament.

In the next place, the convention not merely recognizes arbitration as the most efficacious and equitable means of adjusting a controversy which diplomacy has failed to settle, but the powers agree in advance to resort to arbitration in the first instance instead of force, thereby accepting in conventional form the duty to arbitrate controversies of the specified nature. An examination of the document shows that the renunciation of force is conditioned solely upon arbitration, and that the reserves of independence, vital interests and honor usually accompanying agreements to arbitrate are wholly lacking. In other words, the parties to the convention accept the principle of arbitration without reserves of any kind and pledge themselves, not merely to arbitrate all controversies arising out of contract indebtedness, but, in consideration of such arbitration, to renounce the use of force for the collection of contract debts. It is seen, therefore, that the Conference did something more than accept the principle of obligatory arbitration, and while it declared legal questions and controversies arising out of treaties and conventions susceptible of arbitration without reserve, it pledged the powers accepting and applying international law in their foreign relations, not merely to the principle but to the practice of compulsory arbitration. It cannot be said therefore that



compulsory arbitration failed at The Hague, for it achieved a distinct and one may say an unexpected victory.

The importance of the subject therefore justifies an examination of the successive steps by which the renunciation of the use of force for the collection of contract debts was reached.

### 1. THE ADJUSTMENT OF INTERNATIONAL CLAIMS AND THE MEANS EMPLOYED

It is unfortunately true that international law sanctions force and regards a war, irrespective of the justice or injustice of its origin, as legal in the sense that the outbreak of war creates legal duties and obligations for neutral as well as belligerent. Therefore, as war may exist whether its cause be just or unjust, it follows that war may exist for any cause which any State chooses to regard as of sufficient importance. War may therefore be declared in order that controversies arising out of contract debts be settled by force. But whether we admit the propriety of war or condemn it altogether, partisan and opponent agree that war should be the ultimate means used to settle a controversy, and that it is a little less than criminal to resort to arms without exhausting all other means of adjustment.

Now, these means are of various kinds. In the first place nations ordinarily adjust their minor difficulties through diplomatic channels. If direct negotiation fails to settle the controversy good offices may be offered and mediation proposed in accordance with the express terms of the convention for the peaceful settlement of international disputes.<sup>1</sup> But it is proper to add that diplomacy itself should not be resorted to on behalf of private claimants unless the means at their disposal have been exhausted. In other words, if a citizen of the United States settles in the Argentine Republic, while he does not cease to be a citizen of the United States, he nevertheless subjects himself to Argentine law and justice in all transactions arising out of his residence in that country. The

<sup>1</sup> Articles 1-8 of the Convention for the Pacific Settlement of International Disputes.

most he should ask, and all he is entitled to receive, is that he be treated upon an equality with the citizens of the Argentine Republic, and that he be not unjustly discriminated against in favor of citizens of Argentine or foreigners of other nationalities. If he purchase bonds of the Argentine Government, and if default be made either in payment of principal or interest he should seek his remedy in the Argentine courts, provided an Argentine citizen so circumstanced is permitted to sue his government. If he has entered into an ordinary contract with the Argentine government to construct, we will suppose, a railroad, and the contract is broken by Argentine authorities, he should seek his remedy for the breach of the contract in the courts of justice, provided a citizen of Argentina so circumstanced possesses such a remedy. Especially would he be bound to resort to the law courts if, as generally happens, he had expressly agreed in the contract of concession to resort to the local courts for the settlement of a controversy arising out of the contract, and had specifically renounced the right to secure the settlement of the controversy through diplomatic channels. But it would be futile to insist that an American citizen residing in foreign parts resort to the courts, if the foreign government in question does not permit a foreigner to sue it in the courts.

In the next place, it would be unjust to compel our citizen to abide by the decision of a foreign court concerning his rights if the decision, judicial in form, was in reality a denial of justice. The burden of proof, however, should be upon him to establish the denial, for a suitor is more prone to suggest fraud and corruption when the decision of a court is against him than when it is in his favor. Again, a distinction should be made between a denial and a miscarriage of justice, for a State cannot well guarantee that the law will be correctly applied in every case tried in its courts, whereas it must be presumed to guarantee that there will be no denial, that is, refusal of justice. Therefore, if a citizen of the United States has entered into contractual relations with a foreign government by the purchase of bonds or concessions, or in any other

way has become a creditor of such foreign government, he should not claim a greater right than the native citizen, because he contracts according to the laws of the country and he should seek the remedy open to the native. Until he has sought this remedy and there has been a denial of justice or a miscarriage of justice so gross as to amount to a denial, or unless he establishes beyond reasonable doubt that the remedy offered is wholly inadequate, he should not be permitted to resort to diplomatic means in order to effect a settlement of his debt. If he does request diplomatic support, the Department of State should refuse to grant it; for the policy of the United States has been and is not to press contract claims, but to remit the claimant to his judicial remedy in the debtor country. It, therefore, appears that the resort to diplomacy should not be sanctioned until the claimant has exhausted his remedy in the foreign country and only when the circumstances of the particular case justify diplomatic intervention. The impropriety of a contrary line of action seems to be too clear for argument.<sup>1</sup>

But suppose that the claimant has interested his government in his behalf and has led it to espouse his claim. It is necessary before presenting his case to the foreign government to investigate it in order to ascertain its nature and amount. Proof is demanded and furnished to support the claimant's contention, and, supposing that he acts in perfect good faith, his government ordinarily makes an imperfect and therefore partial investigation based largely if not solely upon testimony furnished by one of the interested parties. Supposing that the claimant be thoroughly honest, he may nevertheless be mistaken and his mistake may involve his country in a serious international difficulty. Even if personally honest, the claimant may have been imposed upon by his agents or business associates, and the documents submitted to his government may be forged in whole or in part, or may bristle with exaggeration and unfounded statement. Yet

<sup>1</sup> For the subject of claims against foreign governments and the practice and procedure in such cases, see Moore's *Int. Law Digest*, Vol. VI, Ch. XXI.

to reach a decision, the government must rely upon these documents: otherwise there is no legal foundation laid for diplomatic good offices or intervention. If the case be presented to the foreign government, that government necessarily possesses the right to reply, but its reply is prejudiced in advance by the fact that the presentation of the claim questions the justice of the defendant government's action. If, however, the reply of the foreign government be received and examined, weighed and rejected, it follows that our government decides the controversy as a judge and condemns without a judicial hearing the foreign State. Even if the examination were careful and the conclusion reached sound, it would still be better to refer the matter to arbitration than to decide it in this manner, for it is a familiar and elementary doctrine that one should not be judge in his own case. Experience shows, however, that the examination made in foreign offices is often not the result of a careful, painstaking examination and that the conclusion reached is not always the decision of a just, upright, unprejudiced judge. This appears conclusively from the fact that claims presented to arbitration have been invariably reduced in amount; that the highest awards rarely if ever exceed 80 per cent of the amount demanded; and that awards have been made for less than one per cent of the claim espoused by a government, pressed through diplomatic channels and eventually submitted to arbitration. If, then, we admit that a refusal of the debtor State to adjust the claim justifies the use of force in order to compel its payment or settlement, the results of arbitration show that nations may be forced into warlike measures by unscrupulous or mistaken creditors. Intervention in such cases is not justified; it is therefore unjust, and, in addition to being unjust, it involves the outlay of a larger sum for armed force than that likely to be recovered by its use.

In the next place, the use of force for the collection of pecuniary claims is unjust, because, if successful, it prejudices the claims of third parties who have not resorted to force to collect or to secure the recognition and eventual settlement of



their unrepresented or unsettled claims. A reference to the decision of The Hague tribunal in the matter of the Venezuelan claims indicates clearly that the use of force gave preferential treatment to the claims of Germany, Great Britain and Italy, to the disadvantage of the neutral claimants who awaited in peace the judicial settlement of their international difficulties.<sup>1</sup>

Then again, the use of force, even supposing that it be not wholly without foundation, is a hardship to the debtor nation, because if it meets or seeks to meet force by force, vast sums of money are diverted from the payment of its just obligations, and the State may thus be deprived of its ability to meet its obligation. We no longer imprison a debtor because he is unable to meet his obligation, for by so doing we not only deprive him of his liberty but of the means of livelihood and the power of extinguishing his debt. Why should coercion be applied to a debtor State, its ports blockaded, its custom houses seized, its territory perhaps occupied, when by so doing the debtor is deprived, as was the prisoner, of the power to meet its obligation, and the rights of other but peaceful suitors be prejudiced?

There is, however, another argument against the use of force against a debtor State, namely, the fact that force is never used in such cases by the larger States in their international relations, but is a remedy, one may say a rod in pickle, reserved solely for the weak and defenseless State. A principle, even if generally recognized, but applied solely to small States for the benefit of large States, cannot find favor in a system of international law supposed to be based upon equality and justice.

## 2. DR. DRAGO'S NOTE OF DECEMBER 29, 1902

The above line of argument, although limited to a particular case, found its formal expression in the note, dated December 29, 1902, by Dr. Luis M. Drago, minister of foreign relations of the Argentine Republic to Señor Martín García Mérou,

<sup>1</sup> For the proceedings and award of The Hague tribunal in 1903 concerning these claims, see *American Journal of International Law* (1908), Vol. 11, pp. 902-911.

minister of the Argentine Republic to the United States, a note which called general attention to the dangers and difficulties arising from the use of force for the collection of public indebtedness.<sup>1</sup> This note, due to a high-minded and generous sympathy for South America, has not only placed its author in the front rank of publicists, but its recognition, albeit in modified form, by The Hague Conference enrolls Luis M. Drago among the benefactors of his kind.

Dr. Drago's note was provoked by the blockade of Venezuelan ports by the governments of Germany, Great Britain and Italy in the year 1902, caused by a failure on the part of Venezuela to indemnify subjects of the blockading States for the damages suffered during recent revolutions and wars in Venezuela, and the failure to meet the external debt as it fell due. It should be said, however, that each of the claimant nations endeavored to settle its difficulties with Venezuela by negotiation and that each offered arbitration of the difficulties, which offer Venezuela refused as inconsistent with its internal organization and with its dignity as a sovereign nation. Dr. Drago did not discuss the claims arising from revolution and wars, nor did he devote attention to claims against Venezuela arising from ordinary contracts. His note is devoted principally to forcible collection of the public debt suggested by the blockade of Venezuelan ports. In the opening paragraphs of his famous note, Dr. Drago stated, in outlining clearly the conditions under which the creditor advances his loan to the debtor nation, that the lender always takes into account the

<sup>1</sup> For the Spanish text of the note, see Dr. Drago's *Cobro Coercitivo de Deudas Públicas* (1906), pp. 9-26. An English translation of the Note is to be found in *American Journal of International Law* (1907), Vol. I, supplement, pp. 1-6. For a careful exposition of the doctrine by its author, see Dr. Drago's *State Loans in their Relation to International Policy*, *American Journal of International Law* (1907), Vol. I, pp. 692-726.

For a sympathetic appreciation of the doctrine and the principles involved, see M. F. de Martens' *Par la Justice vers la Paix* (1904).

The most elaborate presentation of the Doctrine is to be found in *La Doctrina Drago: Colección de Documentos con una Advertencia Preliminar de S. Pérez Triana y una Introducción de W. T. Stead* (1908).

This work gives the entire proceedings of the Second Hague Conference concerning the Doctrine (pp. 87-181) and a bibliography (pp. 255-257).

resources of the country and the probability that the obligations will be fulfilled; that all Governments thus enjoy different credit according to their degree of civilization, culture and their business conduct; that these conditions are considered before the loan is made and the terms arranged accordingly, and that the lender knows he is contracting with a sovereign entity in which exists the inherent qualification that no proceedings for the execution of a judgment may be instituted or carried out against it.

Dr. Drago then stated that the Eleventh Amendment to the Constitution of the United States forbade a citizen or subject to sue a member of the American Union; but that the Argentine Government has made its provinces suable and that suit may be brought against the republic itself before its supreme court on contracts entered into with individuals. Dr. Drago does not maintain that a State should not be sued for its contracts, but that, after suit brought and the indebtedness determined by legal judgment, the State should not be deprived of the right

to choose the manner and the time of payment, in which it has as much interest as the creditor himself, or more, since its credit and its national honor are involved therein.

He insists that the decision imposing the duty to pay

whether it be given by the tribunals of the country or by those of international arbitration, constitutes an indisputable title which cannot be compared to the uncertain right of one whose claims are not recognized and who sees himself driven to an appeal to force in order that they may be satisfied.

The attempt therefore to enforce the payment of Venezuelan indebtedness was viewed as a great hardship by Dr. Drago, who declared that

if such proceedings were to be definitively adopted they would establish a precedent dangerous to the security and the peace of the nations of this part of America.

That Dr. Drago has recognized precedent for his apprehension is apparent to anyone who considers the joint bombardment of Mexico in the year 1860 by Great Britain, France, and

Spain in order to force the payment of public indebtedness. But to quote Dr. Drago

the collection of loans by military means implies territorial occupation to make them effective, and territorial occupation signifies the suppression or subordination of the government of the countries on which it is imposed.

Dr. Drago's statement is not so much a prediction or prophecy as it is a concise statement of actual happenings; for it is well known that the bombardment of Mexico degenerated into a military occupation, and that the scoundrel who throttled one republic in France was prepared to erect an empire upon the ruins of another in America. The withdrawal of the French troops from Mexico, resulting in the downfall and tragic death of Maximilian, was due to the outspoken intention of the United States to enforce the Monroe Doctrine. Dr. Drago is aware of the close relation between the Monroe and the Drago Doctrine, and in his note refers to the following passage from Monroe's famous message:

The American continents are henceforth not to be considered as subjects for future colonization by any European powers. With the governments—whose independence we have acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States.<sup>1</sup>

It is true that the fear of colonization has passed because every foot of American territory is controlled by an organized and recognized government. But the desire for commercial expansion and the struggle to gain the markets of the world might well lead unscrupulous powers to protect their citizens even by an occupation for a longer or shorter period of American soil. Dr. Drago calls attention to the fact that

thinkers of the highest order have pointed out the desirability of turning in this direction the great efforts which the principal powers

<sup>1</sup> For President Monroe's Message to Congress, dated December 2, 1823, containing the so-called Monroe Doctrine, see Richardson's Messages and Papers of the Presidents, Vol. II, p. 209, pp. 217-218.

For the origin, nature and application of the Doctrine, see Moore's International Law Digest, Vol. VI, pp. 369-604.



of Europe have exerted for the conquest of sterile regions with trying climates and in remote regions of the earth. The European writers are already many who point to the territory of South America with its great riches, its sunny skies, and its climate propitious for all products, as, of necessity, the stage on which the great powers which have their arms and implements of conquest already prepared, are to struggle for the supremacy in the course of this century."

Dr. Drago does not deny the duty of the South American countries to meet their obligations and to fulfill the duties imposed by international law on civilized peoples, and states that the principle which the Argentine Republic maintains and would see adopted is

that the public debt can not occasion armed intervention nor even the actual occupation of the territory of American nations by a European power.

Dr. Drago then speaks of the loss of prestige and credit experienced by nations which fail to satisfy the rightful claims of their creditors, but states that failure to meet international obligations is often the result of necessity rather than desire. He cites specifically the failure of Argentine to pay the English loan of 1824, owing to anarchy and disturbance in the republic; but he mentions the fact that, after an interruption of thirty years, Argentine met its obligations without any steps having been taken by its creditors. He feels that the case of Argentine is not isolated, and that the countries generally if given time and opportunity will likewise meet their obligations.

Long, perhaps, is the road that the South American nations still have to travel. But they have faith enough and energy and worth sufficient to bring them to their final development with mutual support.

It will be noted that Dr. Drago takes advantage of the Venezuelan situation in order to establish a principle, namely, that the collection of public debts shall not be effected by force, for bombardment and occupation for such purpose are but conquest and annexation in disguise. It will also be observed that Dr. Drago eliminates from consideration damage arising from war, revolution and ordinary contract debts,

but the public took no note of the limitation contained in Dr. Drago's dispatch, and subjected to examination and criticism the doctrine that force may properly be used to collect national indebtedness of any kind.

Dr. Drago's note was read and discussed in America and Europe with great interest, the doctrine it propounded was designated the "Drago Doctrine" and such it will in all probability continue to be called. The note, it will be recalled, was intended for transmission to the Secretary of State, the late Mr. John Hay, who acknowledged it in a memorandum which neither assented to nor dissented from the propositions set forth; but pointed out, quoting from the President's message to Congress, December 3, 1901, that the Monroe Doctrine did not guarantee any State against punishment "if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American power." At the same time he stated by apt quotation from the President's message of December 2, 1902, the indubitable fact that "no independent nation in America need have the slightest fear of aggression from the United States," and that, as a partisan of arbitration, the United States favored the submission of "claims by one State against another growing out of individual wrongs or national obligations, as well as the guarantee for the execution of the award," to "an impartial arbitration tribunal." It will be seen that the note of Dr. Drago was the occasion, and the reply of the Secretary of State was the germ of the convention for the restriction of force in the collection of contract debts.

The Third Pan-American Conference was to meet at Rio de Janeiro in the summer of 1906, and Mr. Root, as successor to Mr. Hay, was anxious to have the question of the use of force considered by the American nations there represented. In a letter to the committee on program for the Third International Conference of the American Republics, dated Washington, March 22, 1906, Mr. Root said:

I believe that if the acceptance of the principle that contracts between a nation and an individual are not collectible

by force, concerning which subject His Excellency Dr. Drago, the distinguished Argentine Minister for Foreign Affairs, in 1902 addressed an able note to the Argentine Minister in Washington—can be secured at The Hague, a most important step will have been gained in the direction of narrowing the causes of war. For this reason I hope the Committee will deem it well to consider the inclusion of this subject with the others I have referred to.<sup>1</sup>

In the instructions to the American delegation to the Rio Conference, Mr. Root said:

It has long been the established policy of the United States not to use its armed forces for the collection of ordinary contract debts due to its citizens by other governments. We have not considered the use of force for such a purpose consistent with that respect for the independent sovereignty of other members of the family of nations which is the most important principle of international law and the chief protection of weak nations against the oppression of the strong. It seems to us that the practice is injurious in its general effect upon the relations of nations and upon the welfare of weak and disordered states, whose development ought to be encouraged in the interests of civilization; that it offers frequent temptation to bullying and oppression and to unnecessary and unjustifiable warfare. We regret that other powers, whose opinions and sense of justice we esteem highly, have at times taken a different view and have permitted themselves, though we believe with reluctance, to collect such debts by force. It is doubtless true that the non-payment of public debts may be accompanied by such circumstances of fraud and wrong-doing or violation of treaties as to justify the use of force. This Government would be glad to see an international consideration of the subject which shall discriminate between such cases and the simple nonperformance of a contract with a private person, and a resolution in favor of reliance upon peaceful means in cases of the latter class.

Mr. Root said that strong support would be found for this view in the excellent letter of Mr. Drago of December 29, 1902, but stated that, inasmuch as most of the American countries were still debtor nations and the European countries the creditors, it was not for the Rio Conference to undertake to make such a discrimination or to resolve upon such a rule, but that the true course was to request The Hague Conference,

<sup>1</sup> Cobro Coercitivo de Deudas Públicas, pp. 156-157.

where both creditors and debtors would be assembled, to consider the subject.<sup>1</sup>

The question of the collection of contract debts was included in the program in the following form:

A resolution recommending that the Second Peace Conference at The Hague be requested to consider whether, and if at all, to what extent, the use of force for the collection of public debts is admissible.

After much discussion it was unanimously

Resolved by the Third International Conference of the American States, assembled in Rio Janeiro, to recommend to the governments represented therein that they consider the point of inviting the Second Peace Conference at The Hague to consider the question of the compulsory collection of public debts, and, in general, means tending to diminish between nations conflicts having an exclusively pecuniary origin.<sup>2</sup>

Pursuant to this resolution, the United States reserved the right to bring to discussion at the Second Hague Conference the matter of the forcible collection of contract debts.<sup>3</sup> Accordingly the Secretary of State instructed the American delegation to

ask for the consideration of this subject by the Conference. It is not probable that in the first instance all the nations represented at the Conference will be willing to go as far in the establishment of limitations upon the use of force in the collection of this class of debts as the United States would like to have them go, and there may be serious objection to the consideration of the subject as a separate and independent topic. If you find such objections insurmountable, you will urge the adoption of provisions under the head of arbitration looking to the establishment of such limitation. The adoption of some such provision as the following may be suggested, and, if no better solution seems practicable, should be urged:

The use of force for the collection of a contract debt alleged to be due by the Government of any country to a citizen of any other country is not permissible until after

<sup>1</sup> Report of the Delegates of the United States to the Third International Conference of the American States, pp. 41-42.

<sup>2</sup> *Ibid.*, pp. 12-14.

<sup>3</sup> For text of the reservation, see ante, p. 104.



1. The justice and amount of the debt shall have been determined by arbitration, if demanded by the alleged debtor.

2. The time and manner of payment, and the security, if any, to be given pending payment, shall have been fixed by arbitration, if demanded by the alleged debtor.<sup>1</sup>

### 3. THE DISCUSSION OF THE QUESTION OF CONTRACT DEBTS IN THE FIRST COMMISSION

At the second plenary session of the Conference, on June 19, 1907, Mr. Choate reserved in a letter addressed to the President of the Conference the right to present to the Conference the question

of reaching an agreement for the limitation of the employment of force in the recovery of ordinary public debts, having their origin in contract.

And at the first session of the First Commission, held on June 22, 1907, General Horace Porter, to whom the matter of contract debts had been entrusted, announced on behalf of the United States a proposition prohibiting the employment of force for the recovery of debts before recourse to arbitration. The proposition as submitted was in the following form:

In order to prevent between nations armed conflicts solely of a pecuniary origin arising from contractual debts claimed as due from the subjects or citizens of one country by the government of another country and in order to guarantee that all contractual debts of this nature which shall not have been settled peaceably through the diplomatic channels shall be submitted to arbitration, it is agreed that a recourse to no measures of coercion involving the employment of military or naval force for the recovery of such contractual debts shall take place until an offer of arbitration has been made by the creditor and refused or left without response by the debtor, or until the arbitration has taken place and the debtor state has failed to conform to the sentence rendered. It is further agreed that this arbitration shall be in conformity with the procedure of Chapter III of the convention for the pacific settlement of international disputes adopted at The Hague and that it shall determine the equity and the amount of the debt, the time and the mode of its payment,

<sup>1</sup> For Instructions to the American Delegation, see Vol. II, pp. 188-189.

and the guarantee if there be any to give during the delay of payment.<sup>1</sup>

On the sixteenth of July, the amended proposition concerning contract debts was justified by General Porter in a long and careful address, too long to quote in full, but too important to be passed over without quoting at least the concluding paragraphs.

After stating the nature of the problem, the injustice in coercing a debtor to pay a debt often grossly exaggerated, which payment would enure to the sole benefit of the claimant, not the claimant country, at the expense, however, of his country, and after showing that a nation may be prevented from meeting its obligations by "insurrections, revolutions, loss of crops, floods, earthquakes, or other calamities beyond its power," and finally after showing that even defaulting nations in course of time met their obligations and at present enjoy a high credit in the family of nations, the General concluded his address as follows:

Neither the prestige nor the honor of a State can be considered at stake in refusing to enforce by coercive action the payment of a contractual debt due or claimed to be due to one of its subjects or citizens by another nation. There is no inherent right on their part to have a private contract converted into a national obligation. If so, it would be practically equivalent to having the Government guarantee the payment at the outset.

The ablest writers upon International Law consider that the State owes no such duty to its citizens or subjects and that its action in such cases is entirely optional.

While these writers differ as to the expediency of intervention, research shows that a majority are of opinion that there exists no such obligation.

<sup>1</sup> The original proposition was slightly modified by amending the phrase "claim as due to the subjects or citizens of one country by the government of another country" to read, "claimed from a government of one country by the government of another country as due to its subjects or citizens," and in the latter part of the paragraph the word "claimant" was substituted for the word "creditor." Otherwise the original and modified texts were identical except in certain respects to be discussed later.

The following citations from the written opinions of eminent statesmen, diplomatists and juriconsults are valuable and instructive upon this subject:

Lord Palmerston, in 1848, in a Circular addressed to the Representatives of Great Britain in foreign countries, referring to the unsatisfied claims of British subjects who were holders of public bonds of foreign States, after asserting that the question as to whether his Government should make the matter the subject of diplomatic negotiations was entirely a matter of discretion and by no means a question of international right, said:

"It has hitherto been thought by the successive Governments of Great Britain undesirable that British subjects should invest their capital in loans of foreign Governments instead of employing it in profitable undertakings at home; and with a view to discourage hazardous loans to foreign Governments, who may be either unable or unwilling to pay the stipulated interest thereupon, the British Government has hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign Governments which have failed to make good their engagements in regard to such pecuniary transactions."

In 1861 Lord John Russel, in a communication to Sir C. J. Wylie, wrote: "It has not been the policy of Her Majesty's Government, although they have always held themselves free to do so, to interfere authoritatively on behalf of those who have chosen to lend their money to foreign Governments. . . ."

Lord Salisbury in 1880 announced a similar policy. In a debate in the British Parliament—December, 1902—during the controversy with Venezuela, Mr. Balfour, the Prime Minister, said: "I do not deny, in fact I freely admit, that bondholders may occupy an international position which may require international action; but I look upon such action with the gravest doubt and suspicion, and I doubt whether we have in the past ever gone to war for the bondholders, for those of our countrymen who have lent money to a foreign Government; and I confess that I should be very sorry to see that made a practice in this country."

Alexander Hamilton in the early days of the Government of the United States affirmed the same principles saying: "Contracts between a nation and private individuals are obligatory according to conscience of the sovereign and may not be the object of compelling force. They confer no right of action contrary to the sovereign will."

In 1871 Mr. Fish, then Secretary of State of the United States, wrote:

"Our long settled policy and practice has been to decline the formal intervention of the Government except in case of wrong

and injury to person and property such as the common law denominates '*torts*' and regards as inflicted by force, and not the result of voluntary engagements or contracts."

In 1881 Mr. Blaine, Secretary of State of the United States, wrote that a person, "voluntarily entering into a contract with the Government of a foreign country or with the subjects or citizens of such foreign powers, for any grievance he may have or losses he may suffer resulting from such contract, is remitted to the laws of the country with whose Government or citizens the contract is entered into for redress."

In 1885 Mr. Bayard, then Secretary of State of the United States, wrote in a dispatch on this subject:

"All that our Government undertakes to do, when the claim is merely contractual, is to interpose its good offices, in other words, to ask the attention of the foreign sovereign to the claim; and that is only done when the claim is one susceptible of strong and clear proofs."

General Porter then quoted the pertinent portion of Secretary Root's instructions to the American delegates to the Rio Conference,<sup>1</sup> adopted by the President in 1906 with the added paragraph:

It appears that modern public opinion is decidedly opposed to the collection by force of contractual debts. The American Journal of International Law in its first quarterly number of this year says: 'The tendency among publicists is certainly toward the acceptance of the principle of non-intervention as the correct and normal or everyday rule of international law and practice.' . . .

It is not necessary to recall the early consideration and profound study given to this subject by the Argentine Republic and the exhaustive discussion of the question and of kindred subjects contained in the writings of the former Secretary of State of that country, at present one of our highly esteemed colleagues in this Conference.

The view of the majority seems to be that the correct rule of international law is non-intervention, but that intervention is either legally or morally permissible in extreme and exceptional cases.

Debt-collecting expeditions have seldom proved a success. In this age it is assuming a grave responsibility to relegate disputed money claims to the dominion of force instead of law and substitute the science of destruction for the creative arts of Peace.

<sup>1</sup> Printed, ante, p. 398.



The principle of non-intervention by force would be of incalculable benefit to all parties concerned.

First, to the nation whose subjects or citizens have become creditors of a foreign Government in that it would be a warning to a class of persons too apt to trade upon the necessities of feeble and embarrassed Governments and then expect their Government to become responsible for the success of their operations, as it would serve to discourage their transactions. It would enable the Government to continue its normal relations with the foreign State, avoid incurring its ill will and suffering perhaps a loss of its commerce. Such an attitude would also save it from all risk of complications with neutral powers.

Secondly, the recognition of this principle would be a substantial relief to neutrals, the interruption to whose commerce by blockades, hostile operations and the consequent rise in insurance rates becomes a serious menace to their foreign trade.

Thirdly, it would be of advantage to the debtor States, as it would be an announcement to the lenders of money, that they would have to base their operations solely upon considerations of the good faith of the Government, the national credit, the justice of local courts, and the economy practiced in the administration of public affairs. This would relieve such States from the importunities of the speculative adventurer who tempts them with the proffer of large loans which may lead to national extravagance and in the end threaten the seizure of their property and the violation of their sovereignty. The knowledge that all disputed pecuniary claims would be subject to adjudication by an impartial tribunal would be apt to lead prominent bankers and contractors to feel that such claims would be settled promptly without serious disturbance to the administration of the country's public affairs and without the necessity of assuming the task of prevailing upon their Government to undertake the collection of their claims by force of arms. In such case responsible financial men and institutions abroad would be more likely to negotiate loans and make their terms fair and reasonable. The Permanent Court of Arbitration at The Hague would naturally be given the preference in selecting for the settlement of such claims an impartial tribunal.

One significant feature of this Conference is that for the first time in history the creditor and the debtor nations of the world are brought together in friendly council, and it seems a singularly appropriate occasion for an earnest endeavor to agree upon some rule concerning the treatment of contractual debts which may commend itself to all here assembled and result in a general treaty on the subject among the nations represented.

No experienced statesman can doubt that a question which, if left open, may work so much evil in exciting and disturbing

the Commonwealth of Nations by threats, rumors and declarations of war, will some day be removed from the causes of armed conflicts, and if the present Conference from which so much is expected by the onlooking world neglects this proffered opportunity of accomplishing such a beneficent result it will record a regrettable failure and lose the credit of having performed a far-reaching act in the true interests of the world's Peace.<sup>1</sup>

In the commission two important addresses were delivered, one by Dr. Drago through whose famous note the subject was given international standing, and the other by M. Ruy Barbosa, who, while approving in general the doctrine, took issue with Dr. Drago in the matter of public debts.

Dr. Drago first remarked that pecuniary claims arose (1) from injuries sustained by foreign subjects on account of unlawful acts committed either by the Government or by the citizens of the country where such subjects reside; (2) from common-law agreements between the citizens or subjects of the claimant nation and the authorities of another country; and (3) from claims existing in connection with the public debt consisting of national loans secured by bonds.

As to the first and second class of claims, Dr. Drago stated that they came within the jurisdiction of the courts of the debtor country according to the Law of Nations and are subject to the rules and provisions of private law; that the constitutions of all civilized countries determine the procedure to be followed in such cases and that a universally accepted principle of international law provides that local remedies should be exhausted before recourse is had to diplomatic channels and procedure; that "there can be no real difficulty about utilizing this remedy for there are courts of claims everywhere with the necessary jurisdiction to take cognizance of this kind of litigation," and that "the lack of any Court of Claims and the refusal to create one, as well as sentences openly contrary to the laws and to the fundamental principles of law

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, Vol.II, First Commission, First Sub-Commission, 5th Session, July 16, 1907.

itself, would constitute what is characterized in jurisprudence as a 'denial of justice,' and would fall within the sphere of activity of the Law of Nations;" that only in case of a difference of opinion as to the foundation and justice of the sentence rendered by the courts of the debtor nation, . . . . would there be reason to apply arbitration;" and that "finally, it would only be after all peaceful remedies had been exhausted that the employment of other measures could be justified."

With regard to foreign loans, the third class of claims, Dr. Drago stated that they constitute a special class of obligations quite distinct from the others.

The issue of Government bonds is, like the issue of money, a positive manifestation of sovereignty.

It is by an act of sovereignty that a nation orders payment of coupons at maturity, and quite obviously it is by an act of the same character that it decides, in a few special cases, to suspend payment on the debt. It is not, in reality, any particular creditor who has contracted directly with the government, but an indeterminate, unnamed person who purchases bonds at their current value in the market, which value is more or less changeable, but always serves as a perfect index, from the very beginning, of the amount of risk they are running and the degree of certainty of their favor.

The speaker argued that as private individuals were not permitted to summon a government before its own judges on account of the suspension of payment on public loans, the denial of justice is not manifest; that if the legal distinction between ordinary contracts and public loans were not clearly established "we might always arrive at the practical conclusion that there are always courts when it is a question of the former whereas there are none anywhere to judge the others." Dr. Drago then compared the holder of government bonds on which payments had been suspended to the shareholder in a joint stock company which had failed, stating that "the only difference is that the holder of government bonds is in a more favorable position than the stockholder, for the nation does not disappear and becomes solvent again sooner or

later, whereas a company that has failed remains stranded forever without hope of recovery." The learned Doctor then asked:

If, as is evident, private financial misfortunes suffered by the subjects of a nation in a foreign country do not compromise the progress, existence, or happiness of the public at large to which they belong, and do not impose on the latter any duty to protect them, how could a war be justified on the sole ground that these subjects, instead of dealing with private parties, had dealt with the governments themselves in the hope of realizing a larger and surer profit?

To these arguments Dr. Drago added that it may easily happen that when certain nations execute a blockade or naval demonstration for the protection of securities held by their subjects, a greater part of the securities may, owing to their transfer in the meantime, be owned by citizens of other nations, and, indeed, it might even happen that bonds held by subjects of a weak nation would be transferred to subjects of a great Power in order to have them collected forcibly; and, finally, that inextricable confusion would result should the bonds be held by subjects of various countries which intervened separately and presented their claims in a different form and proposed different settlements. He stated that it is impossible to eliminate the risks voluntarily assumed by the creditor with a view to realizing considerable gains, and quoted Sir Henry Campbell-Bannerman's statement that "big dividends generally involve big risks" and "if the whole power of the British Empire were placed behind the capitalist, the latter's risk would disappear and the dividends ought to diminish in proportion." Dr. Drago continued, that war cannot be justified unless there is a serious offense affecting the vital interests, the honor, or the legitimate development of the aggrieved nation, that the non-payment of the coupons of a debt to the casual holders can never be classed among these causes, and that such non-payment ought not, therefore, to constitute a "*casus belli*" between sovereign and therefore equal nations.

Arbitration is always welcome. It represents a step and a considerable one toward justice. No self-respecting nation can



refuse to submit to it, but its effects will necessarily vary in cases of denial of justice and cases connected with loans. A denial of justice, ascertained to exist by arbitration, constitutes a common International Law offense which should call for reparation. A denial of justice, like an act of piracy, is a thing which breaks the equilibrium of and endangers the universal community, and for this very reason falls within the immediate domain of international repression as provided, accepted, and applied by the general consent of all nations.

However, the aspect of matters changes entirely when we consider questions of loans.

Adverting to the provision of the project providing for the use of force should the debtor nation refuse to execute an arbitral award, Dr. Drago repeated that public loans were acts of sovereignty and ought to be considered as such before and after the arbitration; that it was difficult to determine in each case the financial situation of a debtor country without examining into the very depths of its administration, which is itself closely connected with the innermost political and social organization of the nation; that it may happen that the sentence would not be executed in consequence of some error of judgment or of some material impossibility arising from unforeseen and variable circumstances; that should forcible recovery be resorted to in such case the problem would be removed and postponed, but would be far from being solved, and that by accepting this part of the American project

. . . . . we should be taking a great step backwards, for we should be recognizing war as a common legal remedy, we should be establishing one more case of legitimate warfare which would be really inconsistent with a Peace Conference whose very purpose is to remove or at least diminish the causes of war.

The employment of force would always involve a disproportion between the offense and the punishment, being accompanied by the same dangers to local sovereignties, by the same inconveniences and injuries to neutral nations, and affording the same excessive protection to cosmopolitan and everchanging bondholders.

In order to execute the award, would the armies and fleets of the creditor nations be set in motion, would troops be landed, territory occupied, customs administered, taxes levied—in a

word, would the debtor nation be subjected to the control and government of the creditor nation?

It is certain that violent methods would only increase the financial difficulties of the debtor and perhaps contribute to his total ruin, while, on the other hand, the certain restriction of the credit and the bad opinion entertained of the nation which did not meet its engagements would in themselves be a sufficient punishment, and a moral force much more effective than physical force in favor of the creditor.

At all events we cannot accept on this subject the doctrine of Lord Palmerston, which our distinguished colleague General Porter thought it necessary to mention, as being opposed to financial interventions by governments, and which we South Americans consider particularly dangerous. It is known that Lord Palmerston proclaimed, as Lord Salisbury also did later, the indisputable right to intervene in order to collect debts of English subjects, but he subordinated the act of intervention itself to what he called British and domestic considerations, which may easily become political ones on occasion. Our colleague quoted to us the text of part of the celebrated circular of 1848, according to which it is considered good English policy not to encourage subjects who invest their capital in foreign countries by placing the forces of the Empire at their disposal generally. However, in the same dispatch we read words which clearly explain the thoughts of the Minister: "If the government of a nation has a right to demand reparation on behalf of any one of its subjects, it cannot be admitted that the right to such reparation is diminished solely because the amount of the injury sustained is greater and because the claim, instead of involving comparatively small sums, comprises a great number of persons with considerable amounts of capital. It is therefore a question which the British Government alone must decide whether the case shall or not be treated diplomatically."

Dr. Drago then referred to Lord Palmerston's reply to Lord George Bentinck in a debate on the subject of the unpaid Spanish bonds held by British subjects, in the House of Commons July 7, 1847, in which Lord Palmerston admitted the right of the British Government to wage war against Spain for the recovery of the debt, but denied its expediency under the then existing circumstances, concluding his remarks by stating:

But this is a question of expediency, and not a question of power; therefore, let no foreign country who has done wrong to

British subjects deceive itself by a false impression either that the British nation or the British Parliament will forever remain patient under the wrong; or that, if called upon to enforce the rights of the people of England, the government of England will not have ample power and means at its command to obtain justice for them.<sup>1</sup>

Dr. Drago concluded his address with the following paragraphs:

Far be it from my mind to suppose that any of the Powers represented here entertains any scheme of conquest and imperialistic expansion against the weaker nations of America which have no other defense than right and immutable justice.

However, nature has been lavish with our countries, the mild climate and fertile soil of which are favorable to all sorts of products and crops. Being of vast extent and having but a small and widely scattered population, they have been in the past and may still be the object of cupidity. It may then happen, not today, not tomorrow, but in a more or less remote future, that there will obtain in Europe an irresistible current of opinion capable of forcing the Governments to assume an aggressive attitude contrary to their intentions of the present time.

And it cannot be denied that the permanent control and subjection of peoples could not be brought about more easily, in this hypothetical case, than through the financial interventions which we are trying to prevent for this very reason.

Mr. President, at a memorable time the Argentine Republic proclaimed the doctrine, which excludes from the American Continent military operations and the occupation of territory having Government loans as their causes.

Although based on very serious and fundamental considerations, the principle here involved is one of policy and of militant policy, which cannot be and which we shall not see discussed or voted on in this assembly.

I announce it, nevertheless, in order to reserve it expressly and to declare, in the name of the Argentine Delegation, that the latter intends to maintain it as the political doctrine of its country with all the energy manifested in the dispatch sent on December 29, 1902, by our Government to its Representative at Washington on the occasion of the Venezuelan episodes.

It is with this reservation, which will be duly recorded and which relates to the public or national debt arising from Government loans, that the Argentine Delegation will accept arbi-

<sup>1</sup> Moore's International Law Digest, Vol. VI, p. 286.

tration, thus doing fresh homage to a principle which its country has often endorsed.<sup>1</sup>

The other important address on the subject was delivered by M. Ruy Barbosa, and it is one of his ablest and most masterly efforts.

M. Barbosa stated that he would be only too happy to see war abolished, but that, if war were permitted at all, he did not see any legal distinction in the nature of things between national loans and debts from ordinary contracts which would forbid war in the one case and permit it in the other. A contract is a contract whether it be evidenced by a bond or by an ordinary instrument. The distinction drawn between state loans and private contracts refusing force in the one and allowing it in the other is contrary to legal reason. The state loan is a legal act, not merely an act of confidence, but if it be considered an act of confidence, without creating an obligation which may be enforced, is it to be believed that creditors deprived of the means of collecting their loans will continue to advance them? It is admitted, continued M. Barbosa, that the States are bound to pay their debts, but that in the matter of state loans the debtors retain the right to control both the manner and the time of payment, and if that be so the debtor may remit the payment to such a future date or may adjourn the payment so often that the right of creditors will be entirely lost. For legally speaking there can be no doubt that if I have the right of paying only when I care to pay, I do not go beyond my right in adjourning forever the date of payment.

Sovereignty is not really involved, it is rather the abuse of sovereignty, which, if applied within the State, would destroy legal relations just as it would destroy them if admitted in international relations.

"Neither theory nor practice has ever admitted," he said, "this view, which, is in our opinion incorrect, of the position of the State in the matter of loans which it contracts. In our opinion the State in borrowing does not exercise its sovereignty,

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, First Commission, First Sub-Commission, 6th Session, July 18, 1908.



but an act of private law as is the case in so many other contracts in which its personality is divided, that is to say, in which it leaves its political sphere to undertake acts of a civil character."

M. Barbosa did not see that the American proposition tended to legitimize war, for the admission that war may result is simply a recognition of facts as they actually are. The American proposition, had it been less sincere, might have omitted the reference to the use of force in the case of a refusal to arbitrate, but the omission would merely have meant that the possibility of war should be read into the text, though not stated.

In concluding his address, M. Barbosa stated that the Brazilian constitution forbade wars of conquest, and he proposed to amend the American proposition in the following manner so as to prevent this class of wars:

The Signatory Powers undertake not to alter by means of war the actual frontiers of their territory at the expense of any other of these powers, unless arbitration has been refused after being proffered by the power which desires the alteration, or an arbitral award has been violated by the other. If one of the Signatory Powers should neglect this engagement, the alienation of territory imposed by the force of arms shall have no juridical value.<sup>1</sup>

The addresses of Messrs. Drago and Barbosa showed that Latin-America was not of one mind. Dr. Drago's distinction between state loans and private contracts was widely-shared by the American delegations, as was also his view that the duty to arbitrate did not arise before the local remedy has been exhausted. It may be interesting to note that Venezuela was willing to accept the benefit of the renunciation of force but was unwilling to bind itself to arbitrate. Its delegation therefore voted in favor of the first article and against the second, and, as the proposition was adopted as a whole against Venezuela's request that each paragraph be voted separately,

<sup>1</sup> La Deuxième Conference Internationale de la Paix, 1907, Vol. II, First Commission First Sub-Commission, 7th Session, July 23, 1907. See also, Actes et Discours de M. Ruy Barbosa (1907), pp. 60-79.

Venezuela abstained from the final vote and refused to sign the convention.

The larger States of Europe, however, such as Great Britain, Germany, France, Austria-Hungary, accepted the proposition without reservation of any kind. Italy and Spain felt that the phraseology was neither clear nor happy, and, while favorable to the principle, reserved their final vote, as did Japan. Russia seconded the American proposition but limited its action solely to obligations arising in the future.<sup>1</sup> The first delegate of Sweden, M. de Hammarskjöld, a man of remarkable ability, called attention to the fact that the American proposition as worded did not merely permit the use of force but justified it, thereby giving a direct sanction to war undertaken in pursuance of the recognition of war contained in an article meant to limit war.

"I cannot," he said, "support by an affirmative vote the American proposition concerning the limitation of the employment of force in the collection of ordinary public debts having their origin in contracts. This proposition as formulated seems to be an indirect sanction to the employment of force in all cases not expressly covered. Even a State absolutely above all suspicion in fulfilling its obligations cannot well desire that armed execution is partially sanctioned, thus leading to misunderstanding and abuse."<sup>2</sup>

It will be seen later that the revised form of the American proposition presented to the Committee of Examination and adopted by the Conference meets the objection of the distinguished Swedish jurist and statesman; for in the first paragraph the use of force is specifically renounced, and in a subsequent paragraph the debtor State, refusing either to arbitrate or to comply with the requirements of arbitrations, merely loses the benefit of the renunciation mentioned in the first paragraph. Force is neither directly nor indirectly sanctioned:

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, First Commission, First Sub-Commission, 5th Session, July 16, 1907.

<sup>2</sup> Ibid., 8th Session, July 27, 1907.

the law on the subject is thus untouched, and events are left to take their course without reference to the convention.

It will be noted, indeed it has previously been pointed out, that the American proposition bound the Powers to arbitrate controversies arising from contract indebtedness without reserve. This extreme form of compulsory arbitration did not pass unnoticed, for Roumania and Belgium called particular attention to it and abstained from voting because the reserves were not included in the American formula.<sup>1</sup> Switzerland opposed the American proposition and refused to vote for it, because foreigners can sue Switzerland in Swiss courts upon an equality with natives, and because in the second place Switzerland was unwilling to allow the judgments of its courts to be the subject of arbitration.<sup>2</sup> Another cause of opposition was the fact that the proposition, however general in terms, was local and limited in nature and extent, to the American continent. M. Beldiman therefore proposed that the proposition, if adopted, should not be included in the convention for the peaceful settlement of international disputes, but that it should form a separate agreement between the interested powers without reference to this convention.<sup>3</sup> As this request of Roumania coincided with the desire of the American delegation, the subject of contract debts is regulated in a separate and distinct convention, although in the matter of arbitral procedure it necessarily refers to the convention for the peaceful settlement of international disputes.

<sup>1</sup> See address of M. Beldiman (Roumania), La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, First Commission, First Sub-Commission, 8th Session, July 27, 1907.

For the declaration of Baron Guillaume (Belgium) to the same effect, see Committee of Examination A, 15th Session, September 3, 1907; Actes et Documents, Vol. I, p. 560.

<sup>2</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. II, First Commission, First Sub-Commission, 6th Session, July 18, 1907; Plenary Session, First Commission, 8th Session, October 9, 1907; Actes et Documents, Vol. I, p. 337.

<sup>3</sup> For an elaborate exposition of M. Beldiman's reasons for this proposal, see address referred to in note 1, *supra*.

#### 4. THE CONVENTION ON CONTRACT DEBTS AND ITS IMPORTANCE

At the end of the general discussion in the First Commission (July 27, 1907,) the American proposition was approved by 36 votes, none against, and 8 abstentions (Belgium, Greece, Luxemburg, Roumania, Sweden, Switzerland, Turkey and Venezuela.) It was thereupon referred to the Committee of Examination for further discussion and the preparation of a definitive text which might more nearly meet the desires of the delegations. The discussion in the Committee of Examination was very brief. A revised draft was presented by the American delegation, the same in substance, though slightly different in form. As this was the text voted by the Conference without amendment or change, I quote the first two paragraphs of the final version:

The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.

This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.

The difference between this final version and the previous drafts is seen to consist solely in the fact that the renunciation of force is complete in the first paragraph, and the right to use force is not stated in express terms if the debtor should refuse arbitration. The debtor by refusing arbitration loses the benefit of the renunciation. The law is thus left in its present state without comment or explanation. M. de Martens asked if it was the intention of the framers of the project to limit its application to the case in which citizens or nationals of a State, the creditors of another State, should address their government in order to recover the amount of the debt due them.



Is it clearly understood that it depends absolutely upon the government in question to intervene in the conflict between its nationals and a stranger State and even in a case of necessity to replace them in the controversy?

To which question General Porter, on the behalf of the United States, answered in the affirmative.<sup>1</sup> In reply to the criticism of Messrs. Drago and Milovanovitch (Servia) that the expression "contractual debts" was too vague, General Porter stated adroitly that it was not within his province to enter into definitions which it would be almost impossible to formulate. This closed the discussion, at the termination of which M. Bourgeois declared that the French delegation would vote for the American proposition because "we see in it a case of compulsory arbitration," to which Baron Marschall, who had opposed the convention for compulsory arbitration, replied that he did not share this view.<sup>2</sup> The committee thereupon adopted the American proposition in its entirety without modification or indeed without official explanation or definition of the terms employed.<sup>3</sup> In commission, the proposition was discussed at considerable length<sup>4</sup> but was not seriously opposed, and at the 9th plenary session of the Conference, held on October 16, 1907, the Conference adopted the convention for the limitation of force in the collection of contract debts by a vote of 39 in favor to 5 abstentions (Belgium, Roumania, Sweden, Switzerland, and Vene-

<sup>1</sup> La Deuxième Conference Internationale de la Paix, 1907, Actes et Documents, Vol. I, p. 559.

<sup>2</sup> Le Président (M. Bourgeois) déclare que la Délégation française donnera à la proposition un vote favorable—et il ajoute: surtout parce que nous y voyons un cas d'arbitrage obligatoire.

Le Baron de Marschall ne partage pas cette appréciation.—Extract from Procès-verbal, Committee of Examination A, 15th Session, September 3, 1907.

<sup>3</sup> The vote was 12 for, 1 against (Switzerland), Committee of Examination A, 15th Session, September 3, 1907.

<sup>4</sup> For the discussion, see Plenary Session, First Commission, First Sub-Commission, 8th Session, October 9, 1907.

The vote in Commission was 37 for, none against, and 6 abstentions (Belgium, Greece, Luxembourg, Roumania, Sweden, Switzerland).—Ibid.

zuela).<sup>1</sup> There were, however, various objections in the form of reservations.<sup>2</sup>

It may be interesting to note the reservations of Argentine and Peru coming as each does from a distinguished Argentine publicist M. Drago and the late M. Calvo. In announcing the favorable vote of Argentine, Dr. Drago made on its behalf the following reserve:

First, so far as concerns debts arising from ordinary contracts between the citizen or subject of a nation and a foreign government resort shall only be had to arbitration in the specific case of a denial of justice by the local jurisdictions of the contracting country which must first be exhausted. Second, public loans with bond issues constituting the national debt cannot in any case give rise to military aggression nor to the occupation of the soil of American nations.

The Peruvian reservation provided:

That the principles adopted in this proposition cannot be applied to claims or differences arising from contracts between the government of one country and foreign subjects, when it has been expressly stipulated in these contracts that the claims or differences must be submitted to the judges and tribunals of the contracting country.

The convention as voted is remarkably brief, simple and clear notwithstanding the fact that the expression "contract debts" is, as was frequently said, vague and indefinite. The American delegation did not attempt to define and the text was voted as framed without an official interpretation. Had the term "contract debts" not seemed sufficiently broad to include bond issues, Dr. Drago would not have interposed a formal reserve, and the fact that he did interpose such a reserve leads to the conclusion that the term does necessarily include bonds as a form of contract. General Porter, who executed his trust with great tact and skill, refused to define the terms,

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, Actes et Documents, Vol. I, pp. 336-338.

<sup>2</sup> These sufficiently appear in the reservation attached to the table of signatures issued by the Dutch Government and will be found in Vol. II, pp. 532-534.

stating explicitly, although not so reported in the minutes of the Conference, that it was dangerous to define an expression which would undoubtedly be the subject of interpretation by courts of arbitration. The extent of the obligation to arbitrate is left to future arbitration. But it may be said that the broader the meaning of contract debts, the greater will be the benefit conferred upon the debtor State; for, if state loans be included in contract indebtedness, it necessarily follows that the creditor cannot proceed to the use of force to collect these claims but is obliged to propose their submission to arbitration.

The objection made against the convention that force may be used if the debtor does not arbitrate is entitled to little consideration; because in the actual state of affairs a nation may go to war with or without cause, and, in the absence of this convention, could set its army and navy in motion to collect claims arising out of contract. The creditor specifically renounces his right to resort to arms—an incalculable benefit to the debtor, who may always prevent the use of force by acting in good faith. An agreement to arbitrate, actual arbitration, and the performance of the arbitral award preclude force. It may be said that the threat of war will force arbitration, but nations as well as individuals should be bound to meet their obligations and every reason which forces an individual into court should lead a nation to arbitrate its liability.

It will be noted that the second paragraph of the convention prescribes the procedure laid down in part 4, chapter 3, of the convention for the pacific settlement of international disputes. A reference to Article 53 of the convention shows that the permanent court is competent to settle the *compromis* upon the request of one of the parties in the case of

I. A dispute covered by a general treaty of Arbitration concluded or renewed after the present Convention has come into force, and providing for a *compromis* in all disputes and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the Court. Recourse can-

not, however, be had to the court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to compulsory arbitration, unless the Treaty of Arbitration confers upon the Arbitration Tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one Power by another Power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

This may seem to force arbitration upon the debtor and deprive him of the power to settle or agree to the *compromis*. This is, however, erroneous because the article presupposes the acceptance of the offer of arbitration and then provides a means, namely, the Permanent Court, by which the compromise may be framed if the parties in controversy have been unable to agree upon the terms of submission. That this provision is intended to aid the parties, not to deprive either, especially the debtor, of his right to negotiate the *compromis*, is evident from the language of the article, because

this arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

Turning now to the final paragraph of the second article of the convention, it appears that the award shall determine the validity of the claim, the amount of the debt, and the time and mode of payment, that is to say, arbiters are empowered to examine as trained judges the circumstances of the claim in order to establish its validity or to reject it as unfounded. They are likewise competent to fix the amount of the debt, that is to say, supposing that the claim be legal, to determine the amount which the debtor should pay, in view of all the circumstances, and finally, lest an immediate payment should bear harshly upon the debtor, the arbiters have the right to fix the time and the mode of payment. In other words, the arbiters are empowered not merely to reject an unfounded claim or to reduce the amount of the claim,



but, acting as a court of equity and in view of all the circumstances of the case, to fix the time and the mode of payment in such form and manner as to meet the demands of justice without imposing the hardship of immediate payment upon the debtor. Force is not merely displaced by law, but law is tempered by equity.

It will be evident, therefore, that the proposition of the United States—commonly known at the Conference as the Porter proposition—differs from the thesis of Dr. Drago in that its scope is at once broader and narrower; that its purpose is to secure the renunciation of force whether that force would be used to collect a debt or to occupy, as a means of settlement, the territory of the debtor; that it is legal in that questions of law and fact are to be subjected to arbitration. The Drago Doctrine is, on the other hand, political because in ultimate analysis it proclaims the principle that America is not subject to occupation or annexation from claims arising out of public indebtedness. The Drago Doctrine is therefore a program, a manifesto. But the American proposition, without mentioning the subject of occupation or annexation, accomplishes indirectly—by indirection finds direction out—the purpose uppermost in Dr. Drago's mind; for if force is to be renounced in all contract claims—and it is to be hoped that public debts fall within the definition—it follows that no portion of this western hemisphere is to be trampled under foot and bruised by an armed and alien heel.

In letter the American proposition is narrower, because force is not expressly prohibited for this purpose: in spirit it is coextensive. The Monroe Doctrine is a general notice to keep hands off the American continent; the Drago Doctrine is a special warning. The two doctrines are solemn declaration of public policy and as such they are considered by publicists. The Monroe Doctrine is simply an American policy and the Drago Doctrine, however emphatic its language, is nothing but a unilateral, that is, a one-sided statement which does not create an obligation. The convention for the limitation of force in the collection of contract debts is a contract,

entered into by the nations of the world, and at one and the same time, a solemn and formal recognition of the Monroe Doctrine. Through Dr. Drago, the Monroe Doctrine has made its formal entry into public law as distinct from national policy.

On August 17, 1906, Dr. Luis M. Drago standing face to face with Mr. Root in Buenos Aires, stated that

It is consequently our sacred duty to preserve the integrity of America, material and moral, against the menaces and artifices, very real and effective, that unfortunately surround it. It is not long since one of the most eminent of living juriconsults of Great Britain denounced the possibility of the danger. "The enemies of light and freedom," he said, "are neither dead nor sleeping; they are vigilant, active, militant and astute." And it was in obedience to that sentiment of common defense that in a critical moment the Argentine Republic proclaimed the impropriety of the forcible collection of public debts by European nations, not as an abstract principle of academic value or as a legal rule of universal application outside of this continent (which it is not incumbent on us to maintain), but as a principle of American diplomacy which, whilst being founded on equity and justice, has for its exclusive object to spare the peoples of this continent the calamities of conquest disguised under the mask of financial interventions, in the same way as the traditional policy of the United States, without accentuating superiority or seeking preponderance, condemned the oppression of the nations of this part of the world and the control of their destinies by the great Powers of Europe. The dreams and utopias of today are the facts and commonplaces of tomorrow, and the principle proclaimed must sooner or later prevail.<sup>1</sup>

In reply our Secretary of State linked the Drago Doctrine and the Monroe Doctrine in the following measured language:

Upon the two subjects of special international interest to which you have alluded, I am glad to be able to declare myself in hearty and unreserved sympathy with you. The United States of America has never deemed it to be suitable that she should use her Army and Navy for the collection of ordinary contract debts of foreign Governments to her citizens. For more than a century the State Department, the Department of Foreign Relations of the United States of America, has refused

<sup>1</sup> Mr. Root's Speeches in South America (1906), pp. 153-154.

to take such action, and that has become the settled policy of our country. We deem it to be inconsistent with that respect for the sovereignty of weaker powers which is essential to their protection against the aggression of the strong. We deem the use of force for the collection of ordinary contract debts to be an invitation to abuses in their necessary results far worse, far more baneful to humanity than that the debts contracted by any nation should go unpaid. We consider that the use of the army and navy of a great power to compel a weaker power to answer to a contract with a private individual is both an invitation to speculation upon the necessities of weak and struggling countries and an infringement upon the sovereignty of those countries, and we are now, as we always have been, opposed to it; and we believe that, perhaps not today nor tomorrow, but through the slow and certain process of the future, the world will come to the same opinion. It is with special gratification that I have heard from your lips so just an estimate of the character of that traditional policy of the United States which bears the name of President Monroe. When you say that it was (without accentuating superiority or seeking preponderance) Monroe's declaration that condemned the oppression of the nations of this part of the world and the control of their destinies by the great Powers of Europe, you speak the exact historical truth. You do but simple justice to the purposes and the sentiments of Monroe and his compatriots and to the country of Monroe at every hour from that time to this.<sup>1</sup>

<sup>1</sup> Mr. Root's Speeches in South America, pp. 157-159.

## CHAPTER IX

### THE PROPOSED COURT OF ARBITRAL JUSTICE<sup>1</sup>

#### 1. THE PERMANENT COURT OF 1899 AND THE PROPOSED COURT OF 1907

Before undertaking the systematic exposition and analysis of the Project for the establishment of the Court of Arbitral Justice, voted by the Committee of Examination B and referred to the First Commission, it may be advisable to devote a few paragraphs by way of introduction, to the Permanent Court of Arbitration, created in 1899, by the First Conference, alongside of which it is proposed to establish a Court of Arbitral Justice, in order to supplement the existing Court.

It will be remembered that Article 16 of the Convention of 1899 provided that:

In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.

That this solemn declaration of a broad and beneficent principle might not remain a dead letter, the Conference undertook to create a court in which international conflicts might be arbitrated. Article 20 provides as follows:

With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers under-

<sup>1</sup> For full details of the proposed Court of Arbitral Justice and the proceedings had in the First Commission, Committee of Examination B, and in the plenary session of the Conference, see the elaborate report printed in *La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents*, Vol. I, pp. 347-398; 332-335.



take to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention.

The framers of the Convention had in mind the arbitration of international conflicts, and, as it is incident to arbitration that the parties litigant chose their own judges,<sup>1</sup> Article 17 defined and provided that:

The Arbitration Convention is concluded for questions already existing or for questions which may arise eventually.

It may embrace any dispute or only disputes of a certain category.

If Articles 16, 17 and 20 be compared and analyzed it is evident that questions of a judicial nature were deemed peculiarly susceptible of arbitration, and by the establishment of a Permanent Court of Arbitration it was hoped that these questions would be frequently arbitrated and decided on the basis of respect for law. So far it would seem that the foundations were laid for a court in the juristic sense of the word, but arbiters, the choice of the parties litigant, instead of judges were to be appointed.

Inasmuch, however, as the Permanent Court was declared by Article 21 to be "competent for all arbitration cases" it is manifest that the framers of the Convention contemplated that questions other than those of a judicial nature might be submitted to the Permanent Court. There was thus created a single institution which might decide purely legal questions on the basis of respect for law and broader questions of a non-judicial nature—either or both of which were to be decided by judges, that is arbiters, chosen by the parties in controversy.

In modern States judicial questions are decided by judges in courts of justice and the judges are not the direct appointees of the parties. In matters of purely private interest which may be compromised, judges of the parties' choice are as much in place as they would be out of place in a court of justice.

The difference between judicial and non-judicial questions

<sup>1</sup> Article 15.

and the procedure applicable to each was thus outlined by His Excellency M. Bourgeois:

If there are not at present any judges at The Hague it is because the Conference of 1899, taking into consideration the whole field open to arbitration, intended to leave to the parties the duty of choosing their judges, which choice is essential in all cases of peculiar gravity. We should not like to see the court created in 1899 lose its character as a real court of arbitration entirely, and we intend to preserve this freedom of choice of the judges in all cases where no other rule is provided.

In controversies of a political nature especially, we think that this will always be the real rule of arbitration, and that no nation, big or small, will consent to go before a court of arbitration unless it takes an active part in the appointment of the members composing it.

But is the case the same in questions of a purely legal nature? Can the same uneasiness and distrust appear here? And does not every one realize that a real court, composed of real jurists, may be considered as the most competent organ for deciding controversies of this character and for rendering decisions on pure questions of law?

In our opinion, therefore, either the old system of 1899 or the new system of a truly permanent court may be preferred, according to the nature of the case. At all events there is no intention whatever of making the new system compulsory. The choice between the tribunal of 1899 and the court of 1907 will be optional, and experience will show the advantages or disadvantages of the two systems.

The object of the framers of the project of a Court of Arbitral justice is to institute a court of justice for questions of a judicial nature, in accordance with the view of M. Bourgeois, without attempting in any way to subject questions of a non-judicial treatment to discussion and decision of a court of law. The purpose of the proposed court is to carry the work of 1899 a step further by establishing a court of arbitral justice for the judicial decision of questions of a judicial nature.

Article 20, above quoted, looked to a Permanent Court; but it is common knowledge that the court is not permanent, for it exists only for the special case and has to be created anew for each case submitted. There is indeed a permanent list from which the judges can be and indeed must be chosen for the particular case. The framers of the Convention meant

the court to be accessible at all times to the suitors, and it was established in order to facilitate recourse to arbitration. This excellent end was frustrated by faulty machinery, because an unconstituted court cannot be said to be accessible at any time, much less at all times. As M. Asser, a founder and friend and arbiter of the court, said: "It is difficult, time-consuming and expensive to set it in motion."

Mr. Choate said:

One cannot read the debates which ushered in the taking of the great step by the First Conference without realizing that it was undertaken by that body as a new experiment and not without apprehension, but with an earnest hope that it would serve as a basis, at least, of further advanced work in the same direction by a future conference. The project was as simple as the purpose of it was grand, but, as Mr. Asser has well said in his eloquent speech, "it created a court in name only by furnishing a list of jurists and other men of skill in international law from whom the parties to each litigation might select judges to determine the case, who should sit at The Hague according to machinery provided for the purpose and proceed by certain prescribed methods, if no others were agreed upon by the parties. . . ."

We do not err in saying that the work of the First Conference in this regard, noble and far-reaching as it was, has not proved entirely complete and adequate to meet the progressive demands of the nations, and to draw to The Hague Tribunal for decision any great part of the arbitrations that have been agreed upon, and that in the eight years of its existence only four cases have been submitted to it, and of the sixty judges, more or less, who were named as members of The Court at least two-thirds have not, as yet, been called upon for any service. It is not easy, or perhaps desirable, at this stage of the discussion, to analyze all the causes of the failure of a general or frequent resort by the nations to The Hague Tribunal, but a few of them are so obvious that they may be properly suggested. Certainly, it was for no lack of adequate and competent and distinguished judges, for the services they have performed in the four cases which they have considered, have been of the highest character, and it is out of these very judges that we propose to constitute our new proposed court.

I am inclined to think that one of the causes which has prevented a more frequent resort of nations to The Hague Tribunal, especially in cases of ordinary or minor importance, has been the expensiveness of a case brought there, and it should

be one element of reform that the expense of the court itself, including the salaries of the judges, shall be borne at common expense of all the Signatory Powers, so as to furnish to the suitors a court at least free of expense to them, as is the case with suitors of all nations in their national courts.

The fact that there was nothing permanent or continuous or connected in the sessions of the court, or in the adjudication of the cases submitted to it, has been an obvious source of weakness and want of prestige in the tribunal. Each trial it had before it had been wholly independent of every other, and its occasional utterances, widely distant in point of time and disconnected in subject-matter, have not gone far towards constituting a consistent body of international law or of valuable contributions to international law, which ought to emanate from an international tribunal representing the power and might of all the nations. In fact it has thus far been a court only in name, a framework for the selection of referees for each particular case, never consisting of the same judges. It has done great good so far as it has been permitted to work at all, but our effort should be to try and make it a medium of vastly greater and constantly increasing benefit to the nations and to mankind at large.

Let us, then, seek to develop out of it a Permanent Court which shall hold regular and continuous sessions, which shall consist of the same judges, which shall pay due heed to its own decisions, which shall speak with the authority of the united voice of the nations, and gradually build up a system of international law, definite and precise, which shall command the approval and regulate the conduct of the nations. By such a step in advance, we shall justify the confidence which has been placed in us and shall make the work of this Second Conference worthy of comparison with that of the Conference of 1899.<sup>1</sup>

The court, outlined by the Project, is meant to realize the views of the framers of 1899: it is a court in essence and in fact, composed of actual and prospective judges, and it is permanent because in existence and in session.

In thus calling attention to some of the palpable defects of the Convention of 1899, no attempt is made to belittle the Permanent Court which is a landmark in the development of international arbitration. Eight years have now passed since the creation of the Permanent Court of Arbitration and

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, Vol. II, First Commission, First Sub-Commission, 9th Session, August 1, 1907.



the court has been called into being four times. The institution has been tested and has stood the test, and we are able to view the court in the light of experience. Now this experience shows that the theory of 1899 was correct and that the institution created is workable but expensive; it likewise shows that it may be improved and that the great improvement consists in making the court, in fact as in theory, permanent. The most eloquent testimony to the necessity of this improvement is the fact that a founder and friend, and the most experienced and authoritative of living arbiters, M. de Martens, proposed in the very first days of the Conference a project for the permanence of a judicial committee to be selected from the present court.

If the very father can lay hands upon the child and suggest that he mend his ways, it is not to be wondered at that the godfather should speak more boldly.

The United States of America has always favored international arbitration, in theory as in practice, as the heavy volumes of Moore's *International Arbitrations* amply show. In 1899 the American delegation coöperated earnestly in the creation of the present Permanent Court, and it has appeared as plaintiff in two of the four cases tried before it. As the United States was reasonably successful in each case, it cannot be said that it is a defeated litigant that suggests changes and improvements of a fundamental nature. The experience of the United States with its Supreme Court leads it to believe that a Court of Arbitral Justice can be created to decide international disputes between equal and sovereign States of the family of nations, just as surely and truly as the Supreme Court decides disputes of an international character between the States of the American Union.

The United States has always believed and said that the Court of 1899 is the first step to a Permanent Court of Arbitral Justice—and in so saying it merely consults its own recent past. It may not be known generally that the United States instituted a Court of Arbitration a hundred and thirty years ago—during the War of Independence. The thirteen equal

sovereign States, then at war with Great Britain, organized a temporary and loose Confederation. In the fundamental and constitutional act, called the Articles of Confederation, arbitration of international difficulties between the States was established in principle and in fact in the following manner.

Congress was to be the last resort in controversies between the States over boundaries, questions of jurisdiction and other matters. When the authorities or authorized agents of a State petitioned Congress to settle a dispute or difference, notice of the fact was given to the other State in controversy and a day set for the appearance of the two parties by their agents, who were thereupon directed to appoint members of the tribunal by common consent. Failing an understanding, Congress designated three citizens of each of the States of the Union, and from the list thus formed each party, beginning with the defendant, could strike alternately a name until only thirteen remained. From these thirteen, seven or nine were drawn by lot, and the persons thus designated composed the court, which decided the controversy by a majority of votes. A quorum of at least five judges was required. In case of non-appearance of one of the parties without a valid reason, or of his refusal to take part in the formation of the tribunal, the Secretary of the Congress performed this duty in his stead. The award was final in all cases, and each State pledged itself to carry out the award in good faith. The judges had to take an oath before one of the judges of the Supreme or Superior Court of the State where the tribunal sat that they would perform their duties carefully and without partiality or desire for gain.

Even a superficial examination of these provisions shows the striking likeness between the Court at The Hague and its American predecessor and prototype.

The history of the American Court of Arbitration is quickly told: it failed to justify its existence, and, lacking the essential elements of a court of justice, it was superseded within ten years of its creation by the present Supreme Court in which

controversies which might lead to war, if between sovereign States, are settled by judicial means.<sup>1</sup>

Will history repeat itself? Conscious of the weakness and defects of the American Court of Arbitration and recognizing the admirable results of the judicial settlement of international controversies by a Permanent Court composed of judges, the American delegation presented a project for the establishment of a really Permanent Court, composed of learned and experienced judges, open to all the Signatory Powers without the delays and formality necessarily involved in the organization for each case of a special tribunal.

Passing from the considerations of a general nature to the actual proceedings in the Conference, the First sub-commission of the First Commission found itself confronted, at the session of August 1, 1907, by two propositions looking to the permanency of the international court. The first was a Russian project,<sup>2</sup> the second the original project of the American Delegation.<sup>3</sup>

The discussion that took place on August 1 and on August 3 was of a general nature, and dealt with the question whether the establishment of a Permanent Court composed of judges ready to receive and decide cases submitted to them was in itself desirable in present conditions.

## 2. DISCUSSION IN THE FIRST COMMISSION OF THE PROPOSED COURT OF ARBITRAL JUSTICE

At the session of August 1, Mr. Choate unfolded and explained the American project. He began by quoting the following passage from President Roosevelt's letter of April 5, 1907 to Mr. Carnegie, read at the Peace Congress held at New York:

<sup>1</sup> *Missouri v. Illinois*, 200 U. S., 496, 518 (1905).

<sup>2</sup> *La Deuxième Conférence Internationale de la Paix*, 1907, Vol. II, First Commission, Annex 75.

<sup>3</sup> For the text of this important document, see Appendix, pp. 816-817.

I hope to see adopted a general arbitration treaty among the nations, and I hope to see The Hague Court greatly increased in power and permanency, and the judges in particular made permanent and given adequate salaries, so as to make it increasingly probable that in each case that may come before them they will decide between the nations, great or small, exactly as a judge within our own limits decides between the individuals, great or small, who come before him. Doubtless many other matters will be taken up at The Hague; but it seems to me that this of a general arbitration treaty is perhaps the most important.

Mr. Choate then stated that the Instructions to the American delegation were

to secure, if possible, a plan by which the judges shall be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented.<sup>1</sup> . . . .

We have not in the proposition which we have offered, attempted even to sketch the details of the constitution and powers and character of our proposed court. We have not thought it possible that one nation could of itself prescribe or even suggest such details, but that they should be the result of consultation and conference among all the nations represented in a suitable committee to be appointed by the President to consider them.

The plan proposed by us does not in the least depart from the voluntary character of the court already established. No nation can be compelled or constrained to come before it, but it will be open for all who desire to settle their differences by peaceful methods and to avoid the terrible consequences and chances of war.

In the first Article of our Project we suggest that such a Permanent Court of Arbitration ought to be constituted—and that is the great question of principle to be first decided. And to that end we submit that it should be composed of not more than seventeen judges, of whom nine should be a quorum, men who had enjoyed the highest moral consideration and a recognized competence in questions of international law. That they shall be designated and elected by the nations, but in a way prescribed by this entire Conference, so that all the nations, great and small, shall have a voice in designating the manner of their choice; and that they shall be chosen from so many different countries as fairly to represent all the different systems of existing law and procedure, all the principal languages of

<sup>1</sup> For instructions, see Vol. II, p. 191.



the world, all the great human interests and a widely distributed geographical character; that they shall be named for a certain number of years, to be decided by the Conference, and shall hold their offices until their respective successors to be chosen as the Conference shall prescribe, shall have accepted and qualified.

Our second Article provides that our permanent Court shall sit annually at The Hague upon a specified date, the same date in each year, to be fixed by the Conference, and that they shall remain in session as long as the necessity of the business that shall come before them may require. That they shall appoint their own officers and, except as this or the succeeding Conference prescribes, shall regulate their own procedure. That every decision of the court shall be by a majority of voices, and that nine members shall constitute a quorum, although this number is subject to the decision of the Conference.

We desire that the judges shall be of equal rank, shall enjoy diplomatic immunity and shall receive a salary to be paid out of the common purse of the nations, sufficient to justify them in devoting to the consideration of the business of the court all the time that shall be necessary.

By the third Article we express our preference that in no case, unless the parties otherwise agree, shall any judge of the court take part in the consideration or decision of any matter coming before the court to which his own nation shall be a party. In other words, we would have it in all respects strictly a court of justice and not partake in the least of the nature of a joint commission.

By the fourth article we would make the jurisdiction of this Permanent Court large enough to embrace the hearing and decision of all cases involving differences of an international character between sovereign states, which they had not been able to settle by diplomatic methods, and which shall be submitted to it by an agreement of the parties; that it shall have not only original jurisdiction but that room shall be given to it to entertain appeals, if it should be thought advisable, from other tribunals, and to determine the relative rights, duties or obligations arising out of the sentences or decrees of commissions of inquiry or specially constituted tribunals of arbitration.

Our fifth article provides that the judges of the court shall be competent to act as judges upon commissions of inquiry, or special arbitration tribunals, but in that case, of course, not to sit in review of their own decisions, and that the court shall have power to entertain and dispose of any international controversy that shall be submitted to it by the Powers.

And finally, by article sixth, that its membership shall be made up as far as possible out of the membership of the existing court, from those judges who have been or shall be named by

the parties now constituting the present Conference, in conformity with the rules which this Conference shall finally prescribe.<sup>1</sup>

Mr. Choate was followed by another member of the American delegation who explained technically and in detail the principles upon which a Permanent Court should be based.<sup>2</sup>

His Excellency M. de Martens, who, as has already been said, was a founder and friend of the Permanent Court of Arbitration, thereupon pronounced a remarkable discourse, showing in the first place that under the terms of the program for the Conference the creation of a Permanent Court was permissible, and giving to the idea of permanence the support that comes from theoretical and practical experience in international arbitration.

We are agreed, he said, on one essential and indisputable fact, namely, that the present Permanent Court is not organized as it should be. An improvement is needed and it is our task to make it. This task is an important one—indeed, the most important one, in my opinion, of all those devolving upon us.

I have under my eyes the Russian Circular of April 3, 1906, which contains the program adopted by all the Powers. It speaks, first of all, of the necessity of perfecting the principal creation of the Conference of 1899—that is, the Permanent Court. The First Conference departed with the conviction that its task would be completed subsequently as a result of the steady progress of enlightenment among peoples, and as the results of acquired experience manifested themselves. Its most important creation, the International Court of Arbitration, is an institution which has already been tested and which has grouped together for the general welfare, as an *æropagus*, jurisconsults enjoying universal respect.<sup>3</sup>

However, M. de Martens realized the deficiencies in the work of 1899. "The Court of 1899 is but an idea which occasionally assumes shape and then again disappears." This has induced the Russian delegation to present a project, but it does not by any means mean to offer this project as the

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, Vol. II, First Commission, First Sub-Commission, 9th Session, August 1, 1907.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

sole basis of the deliberations. The project in the first place sanctions the absolute choice of the arbitrators by the Powers. The idea of the list is retained, but, considering that the arbitrators composing it should be known and be at least in part at the disposal of the nations, M. de Martens suggested the idea of periodical meetings, during which the members would select a permanent tribunal of arbitration to be always at the disposal of the powers which might desire to have recourse to it.

This Permanent Court would be composed of three members. However, the number of judges could be increased at any time. Instead of three members, five, seven, or nine members could be elected. This is a question of detail.

The advantage of the Russian project consists in the retention of the present foundations, on which it proposes to construct another edifice better adapted to the just demands of international life.

Baron Marschall von Bieberstein pledged in brief but eloquent terms the support of the German delegation.

I declared a few days ago that the German Government considers the establishment of a Permanent Court of arbitration as a real step in the line of progress.

I wish now, while this discussion is being opened, formally to repeat my declaration in the name of the German delegation. I take real pleasure in accepting the general principles so eloquently defended by the delegates from the United States.

We are ready to devote all our energy toward the accomplishment of this task which M. de Martens very correctly defined, on presenting it, as one of the most important ones of the Second Peace Conference.<sup>1</sup>

Sir Edward Fry gave to the idea the support of the British delegation, and Messrs. de la Barra, on behalf of Mexico; Larreta, Drago, and Saenz Peña, first delegates from Argentina, stated that their delegations were in favor of the idea of permanency. At the following session, Messrs. Esteva, first delegate from Mexico; Milovanovitch, in the name of the

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, Vol. II, First Commission, First Sub-Commission, 9th Session, August 1, 1907.

Servian delegation; Belisario Porras, delegate from the Republic of Panama; J. N. Léger, delegate from Haiti; José Gil Fortoul, delegate from Venezuela; Ivan Karandjouloff, delegate from Bulgaria; the Marquis de Soveral, in behalf of Portugal; Samad Khan Momtas-es-Saltaneh, in behalf of Persia; and J. P. Castro, in behalf of Uruguay, stated that they agreed to the general outlines of the American project, some without any reservation and others making reservations regarding the composition of the court. Mr. Esteva, in particular, stated that he voted only with reservations,

because the principles which are to serve as a basis in the establishment of the Permanent Court were of such great importance that the Mexican delegation would not give its final vote until it had learned of the various projects for the organization of the court.

In the session of the third of August, Mr. Choate repeated what he had previously said in his discourse that the proposed court was not to be obligatory, that it was not to supplant the Permanent Court of 1899, and that each litigant should have the free and untrameled right to choose which of the two institutions he preferred.

Whereupon M. Beernaert, of Belgium, delivered a long and careful discourse in which he replied to the arguments in favor of the proposed court, and expressed his profound and earnest conviction that the line of progress was in the direction of 1899, that the institution of 1899 was preferable to the proposed one, and that the new court with permanent judges imposed upon the litigants would destroy the principle of selection which is the essence of arbitration.<sup>1</sup>

Sir Edward Fry replied briefly to the remarkable discourse of M. Beernaert and stated in a few short sentences the problem before the commission:

If it were a question of supplanting the present Permanent Court by a new court to be created, I should without hesitancy side with M. Beernaert, but the American scheme proposes

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, Vol. II, First Commission, First Sub-Commission, 10th Session, August 3, 1907.



the creation of a new court *in addition* to the present court. The two courts will work together toward the same goal, and the one which appears to answer the needs of the nations best will survive.

The choice will be free to the nations, and it is very certain that the most effective court will be chosen.<sup>1</sup>

The discussion was practically closed by the eloquent and unanswerable discourse of M. Léon Bourgeois, who spoke not as President but as first delegate of France, distinguishing between the Permanent Court of Arbitration of 1899 and the proposed court, showing conclusively that each would have its separate and distinct sphere of interest and influence, and that the existence of the two courts would be a double guarantee for the world's progress toward justice and peace.

What we must find out is whether, for limited purposes and under special conditions, it is not possible to secure the working of arbitration more quickly and easily under a new form in no way incompatible with the first form.

For questions of a purely legal nature, a real court composed of juriconsults should be considered as the most competent organ. . . . It is therefore either the old or the new system that is to be preferred, according to the nature of the cases.

Thus we see before us as two distinct domains, that of permanency and that of compulsoriness. However, we reach the same conclusions in both domains.

In the domain of universal arbitration there is a zone of possible compulsion and a zone of necessary option. There is a vast number of political questions which the condition of the world does not yet permit to be submitted universally and compulsorily to arbitration.

Likewise, in the domain of permanency, there are cases whose nature is such as to permit and perhaps to warrant their submission to a permanent tribunal. However, there are others for which the system of 1899 remains necessary, for it alone can give the nations the confidence and security without which they will not go before arbitrators.

Thus, it is seen that the cases in which the Permanent Court is possible are the same as those in which compulsory arbitration is acceptable, being, generally speaking, cases of a legal nature. Whereas political cases, in which the nations should be allowed freedom to resort to arbitration, are the very ones in which arbi-

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, Vol. II, First Commission, First Sub-Commission, 10th Session, August 3, 1907.

trators are necessary rather than judges, that is, arbitrators chosen at the time the controversy arises.<sup>1</sup>

The president having thereupon submitted the question of putting the American proposition to a vote, twenty-eight votes were cast in favor of taking under consideration the establishment of a Permanent Court of Arbitration, and twelve States refraining from voting.<sup>2</sup>

The American and Russian propositions were then referred to the Committee of Examination, for the elaboration of the project.<sup>3</sup>

### 3. DISCUSSION IN THE COMMITTEE OF EXAMINATION B

The Committee of Examination was therefore confronted by two projects at its first meeting on August 13, 1907. The Russian project was not discussed. The American project served as a basis for discussion, but it is useless to consider it in detail, for it was withdrawn in favor of a common project of the German, American and English delegations. Later, at the third meeting of August 29, His Excellency M. Barbosa, first delegate from Brazil, presented a project which he accompanied by a powerful address in which he went into considerable detail. This project was afterwards withdrawn by Mr. Barbosa. Propositions from the Bulgarian, Haitian and Uruguayan delegations regarding the composition of a Permanent Court were also presented.

The Russian project sought to make use of the Permanent Court and out of its membership to select a small committee

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, Vol. II, First Commission, First Sub-Commission, 10th Session, August 3, 1908.

<sup>2</sup> Those voting in favor of the motion were Germany, United States, Argentina, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Dominican Republic, France, Great Britain, Haiti, Italy, Japan, Luxembourg, Mexico, Montenegro, Panama, Paraguay, Netherlands, Peru, Persia, Portugal, Russia, Salvador, Uruguay, Venezuela. Those refraining were Austria-Hungary, Belgium, Denmark, Spain, Greece, Norway, Roumania, Servia, Siam, Sweden, Switzerland, Turkey.

<sup>3</sup> The above account is freely translated from the Report to be found in La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, pp. 347-354.

ready at any time to receive cases and to decide them. For example, the members of the Permanent Court of Arbitration were to assemble every year at The Hague in plenary session:

1. To select by secret ballot three members from the list of arbitrators, who must be ready at any time during the ensuing year immediately to constitute the Permanent Tribunal of Arbitration; 2, to take cognizance of the annual report of the Administrative Council and of the International Bureau; 3, to express the opinion of the Permanent Court of Arbitration upon the questions which have arisen during the sessions of the tribunal of arbitration, as well as on the acts of the Administrative Council and the International Bureau; 4, to exchange their ideas regarding the progress of international arbitration in general.

The members of the Permanent Tribunal of Arbitration were to be eligible for reelection. An examination of the project shows that every year the members of the Permanent Court of Arbitration, of whom there could not be more than four from each State, were to assemble at The Hague to form themselves into a committee on arbitration, and to devise means whereby arbitration and the Permanent Court might be made more effective. They were to choose from their assembly three members, who, when selected, would probably reside in The Hague and devote their time exclusively to cases presented for their decision. The distinction is thus clearly drawn between the Permanent Court on the one hand, which is in reality nothing but a panel or list of judges, and a tribunal of arbitration and a court in the ordinary acceptation of the term. The Russian project if adopted would have been a decided improvement upon the present Permanent Court, because it would have created a tribunal in session before which litigants might appear. The aim of the project undoubtedly was to establish this Permanent Tribunal and to interest the permanent panel in the procedure by having the judges assemble at The Hague and constitute the tribunal for the succeeding year. The Russian project was not discussed in the Committee of Examination, but the suggestion of a permanent tribunal composed of three members appears in the project drafted by the committee and ultimately accepted by the Conference.

The Brazilian proposition was designed to constitute a workable tribunal in accordance with the requirements of juridical equality, not merely in right, but in the exercise of the right. Each Signatory Power was to designate a person able and willing to serve as a judge, and each person so designated was to serve for a period of nine years. In order that the court should deliberate in plenary session it was necessary for at least one-quarter of the members appointed to be present, and in order to assure the possibility of this the members appointed were to be divided into three groups, according to the alphabetical order of the signatures of the convention. The judges classed in each of these three groups were to sit in rotation for three years, during which they were obliged to establish their residence within twenty-four hours of The Hague, to which they might be summoned by telegraph. The group would thus form the court, but all members of the court were to have a right, if they desired, to attend the plenary sessions even although they did not belong to the group in session. The parties at variance were to be free to submit their controversy to the full court or to choose from among the members of the court such number of judges as they desired to consider their controversy. The court was to be convened in plenary session to pass upon controversies submitted to them by the parties, or if the matter in litigation was referred to a less number of arbitrators, then the full court was to be convened upon the request of the arbitrators in order to settle a question raised among them during the trial of the case.

The Brazilian plan was thus to have each nation, large or small, designate one judge, and as forty-six nations were invited to The Hague we may place the number of judges at forty-six. These forty-six judges were to be arranged in an alphabetical table and the first third was to be set aside as Group 1, the second third as Group 2, and the last third as Group 3. The membership of the group would not be more than fifteen; it might be less, because several nations might appoint one and the same person as their representative. The



Brazilian plan differed from the project elaborated by the committee in that it was inconsistent with the existence of the Permanent Court as constituted in 1899, and accordingly the Brazilian plan contemplated the abolition of this court and the substitution of the new in its place. As, however, the project was not discussed by the committee and was withdrawn by M. Barbosa, it does not seem advisable to discuss it in detail.

As far as is known the American delegation was the only one that went to The Hague with express instructions to propose the establishment of a Permanent Court of Justice composed of judges and acting under a sense of judicial responsibility. Secretary Root is a partisan of a Permanent Court, and he instructed the American delegation as follows:

The method in which arbitration can be made more effective, so that nations may be more ready to have recourse to it voluntarily and to enter into treaties by which they bind themselves to submit to it, is indicated by observation of the weakness of the system now apparent. There can be no doubt that the principal objection to arbitration rests not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitrations to which they submit may not be impartial. It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results. It very frequently happens that a nation which would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process. If there could be a tribunal which would pass upon questions between nations with the same impartial and impersonal judgment that the Supreme Court of the United States gives to questions arising between citizens of the different States, or between foreign citizens and the citizens of the United States, there can be no doubt that nations would be much more ready to submit their controversies to its decision than they are now to take the chances of arbitration. It should be your effort

to bring about in the Second Conference a development of the Hague Tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility. These judges should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented. The court should be made of such dignity, consideration and rank that the best and ablest jurists will accept appointment to it, and that the whole world will have absolute confidence in its judgments.<sup>1</sup>

In the passage just quoted the difference between the Court of 1899 and the proposed Court of 1907 is pointed out clearly. The first is a court composed of honorable men with high standards of justice, but who do not need to have had legal training or judicial experience. The court proposed by the American delegation was to be a court in the technical sense of the word, composed of judges who had had experience in the practice and interpretation of law, and therefore were competent to decide difficulties presented to them "by judicial methods and under a sense of judicial responsibility." The judges were not to be selected from any group of countries, but chosen in such a way that the different systems of law and procedure as well as the principal languages of the world might be fairly represented.

It will be noted that the instructions of Mr. Root determined the character of the court, and the first article of the project as ultimately drafted is little more than a paraphrase of his instructions; for the court is not only to be free and easy of access, but, to be

composed of judges representing the various juridical systems of the world and capable of insuring continuity in jurisprudence of arbitration.

After weeks of careful debate and discussion in the Committee of Examination, and after some slight amendments in

<sup>1</sup> See Vol. II, p. 191.

the First Commission a project of thirty-five articles was eventually adopted by the Conference and recommended for adoption as soon as the Powers should agree upon the choice of judges and the constitution of the court. The project of a convention which it is hoped will be put into effect by the powers in the near future is divided into three parts—Articles 1 to 16 dealing with the organization of the court; Articles 17 to 33 regulating its jurisdiction and procedure; and Articles 34 and 35 of a purely formal nature regarding the duration of the convention and its ratification.

#### 4. ANALYSIS OF THE PROJECT FRAMED BY THE COMMITTEE OF EXAMINATION, ADOPTED BY THE FIRST COMMISSION AND RECOMMENDED BY THE CONFERENCE

The Permanent Court of Arbitration was established in the year 1899

with the object of facilitating an immediate recourse to arbitration for international differences which could not be settled by diplomatic methods.<sup>1</sup>

The proposed Court of 1907 had the same end in view, namely, to promote the cause of arbitration. But the new court if established, while it might compete with the old, was not intended to supplant it, for the contracting powers agreed to constitute it "without altering the status of the Permanent Court of Arbitration." The Permanent Court of 1899 was to be accessible at all times, but however much one may commend it, still we must admit that it did not and could not realize the intention of its founders in this respect. Indeed, the name of the institution is very unfortunate, because there is in reality no permanent court. There is at best a panel or list of judges from whom the Signatory Powers may select a number to form a temporary tribunal for the decision of a case submitted to it. The list is indeed permanent; the tribunal is temporary, and has to be constituted anew for each case.

As the Permanent Court is not a court but a list; as the tri-

<sup>1</sup> Convention for the pacific settlement of International Disputes, Article 15.

bunal constituted with much difficulty and delay for each case is not permanent, but temporary and occasional, the real designation of the so-called court as a court is a misnomer; the permanence of a non-existing court is a fiction, and the pretension that a non-existing court, to be created from a list of judges is not only permanent but "accessible at all times" is self-deception. The true nature of the Permanent Court was clearly and repeatedly pointed out by Dr. Zorn during the First Conference. Germany accepted it because it was not permanent, although fearful that if established it might become so. The designation of the list as a Permanent Court instead of a mere panel has created the impression that a court really exists, and has rendered difficult the creation of a new and different institution. Such is the magic of a name. The project of 1907 contemplated the creation of a truly Permanent Court which in whole or in part should hold regular terms and be in session at The Hague during the life of the convention. The new institution was to be easy of access inasmuch as it would be open to any contracting party, and it was to be free in that the expenses of the court, as distinct from the fees of counsel, were to be borne by the community of nations. The temporary tribunal selected by the powers in controversy might be composed of diplomats or jurists and would not necessarily represent anything but the confidence of the appointing parties; whereas the Court of Arbitral Justice was to be composed of judges representing the various juridical systems of the world and capable of insuring continuity in jurisprudence of arbitration. This last qualification is of fundamental importance, because an international court should represent the various juridical systems of the world, for it is only by judges trained in these various system that we can hope to create and develop that international equity which would be at once the honor and the justification of the court. And finally, the importance of the continuity in jurisprudence of arbitration should not be overlooked, because each decision of a Permanent Court, if not absolutely binding on the discretion of the judges, would nevertheless form a



precedent, and a succession of precedents would build up a compact body of international law and jurisprudence. This would be the natural consequence of a Permanent Court composed of judges sitting for a longer or shorter time. It can hardly be expected that the judgment of an occasional court will profoundly influence the judgment of a subsequent temporary tribunal composed of different judges. The *esprit de corps* is lacking, even although each body acts under a sense of judicial responsibility.

The Convention of 1899 provided that the panel should be composed of not more than four persons nominated by each Signatory Power,

of recognized competence in questions of international law enjoying the highest moral reputation, and disposed to accept the duties of arbitrator.<sup>1</sup>

The judges of the proposed Court of Arbitral Justice were likewise to be persons of moral reputation and recognized competence in matters of international law. So far the institutions have a point in common; but the judicial nature of the creation of 1907 at once appears in the further requirement that the persons designated as judges shall possess the qualifications required for judges in the higher courts of their respective countries, or shall be jurists of recognized competency. We see, therefore, that the Conference of 1907 sought to establish a Permanent Court composed of judges who either had occupied judicial position or who were qualified for it by the laws of their respective countries in order that, acting under a sense of judicial responsibility, their judgments would command the respect alike of plaintiff and defendant. The first article stipulated that the Court of Arbitral Justice was to be established without striking a blow at the Permanent Court of 1899. In order to establish a connection between the two, although the two courts were to be independent of one another, it was hoped that the judges of the new court should be appointed as far as possible from the permanent panel of the

<sup>1</sup> Convention for the pacific Settlement of International Disputes, Article 23.

old. It was felt that the nations would have greater confidence in the new institution if it were not opposed to the creation of 1899 but stood in close relation to it.

The judge of the permanent panel of 1899 was to be selected for a period of six years, subject to reappointment, and in case of death or resignation his place was to be filled in accordance with the method of his appointment. The judges of the Court of Arbitral Justice were to be appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative Council, and were eligible for reappointment. In case of death or withdrawal, the vacancy was to be filled in the manner of the original appointments. The appointment, however, was for the full period of twelve years. A long period of service was thought essential to the success of the projected court, for however good a judge may be at the date of his appointment, experience on the bench develops his faculties and makes him more competent. Experience likewise often develops latent and unsuspected faculties. The framers of the convention thought that six years—the tenure of the judges of the Prize Court—might be too short a period to develop the full strength of a judge and, wishing the world to profit by the wisdom, knowledge, and experience gained in its service, fixed the period at twelve years. The influence and importance of this long tenure on the development of international law and the continuity in arbitral jurisprudence are too obvious for comment.

The convention does not specify the number of judges necessary to constitute the court, but it is evident that a judge from each country would form a body of forty-six. This might be a judicial assembly, but it would certainly not be a manageable court. On the other hand, the requirement of the first article, that the court should be composed of judges representing the various juridical systems of the world, would suggest a court of approximately fifteen persons—certainly not more than seventeen. Either number would seem large to an American who finds nine judges sufficient to constitute a

Supreme Court for the forty-six States composing the American Union.

Whatever be the number of judges and the manner of their appointment, the judges are however equal and rank according to the date on which their appointment was notified, and each receives as judge of the Court of Arbitral Justice an annual salary of 6000 Netherland florins—in round numbers, 2400 American dollars. The projected court was to be permanent, and in order to effect this purpose the judges must either reside at The Hague or be prepared to go to The Hague so that they may decide the cases presented to the court. It was felt that a judge would feel more bound to attend to his duties if he were paid an adequate salary, because acceptance of the salary necessarily involves the duty of performance of service for which it was received. The judge therefore is to be a permanent official of the court, pledged by oath to exercise his functions impartially and conscientiously, and the recipient of a annual salary during his tenure, to be paid not by the litigants but by the Signatory Powers. It may be admitted that the sum of 6000 florins is in itself inadequate, but, on the other hand, it must be borne in mind that the judge may rarely be called into service and receives the stipend whether his court have much or nothing to do. To this sum must be added traveling expenses, fixed in accordance with the regulations in existence in his own country, and finally in the exercise of his duty during the session or in special cases covered by the convention each judge receives the additional sum of 100 florins per diem. While it can not be maintained that the salary is munificent, still 6000 florins annually, traveling expenses, and the additional compensation of 100 florins per day when acting as judge, are surely a sufficient reward to one whose sole purpose in life is not to amass wealth, and to whom dignity, honor and a consciousness of public usefulness count for something. It should also be said that the position of judge will probably not interfere with professional engagements at home; for, while it is supposed that the court will hold terms, it is not likely that continuous actual presence in The Hague will be required for

some years to come. Therefore, a judge may be engaged in the practice of law, or he may be a professor of law in a European university or he may be an official of government; but as judge he is an official of the court and may not receive from his government or from that of any power any remuneration for service connected with his duties in his capacity as judge (Article 10). For the same reason he may not exercise his judicial functions in any case in which he has in any way whatever taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties; nor can he act as agent or advocate before the Court of Arbitral Justice or the Permanent Court of Arbitration, before a special tribunal of arbitration, or a commission of inquiry; nor can he act for any of the parties in any capacity whatsoever so long as his appointment lasts (Article 7). The judge, therefore, of the proposed Court of Arbitral Justice is to be a judge in the technical sense of the word, whose chief and sole duty is to the court of which he has the honor to be a member; who looks to his home country neither with fear nor favor, for it dare not reward him financially; and who, by the very nature of the position, is forbidden to appear or serve in any capacity other than judge in any tribunal constituted or recognized by the convention. If we compare the like provision of the Permanent Court, we see at once that the Court of Arbitration is not considered a court in the strict sense of the word, because the members of the Permanent Court may act as agent, counsel, or advocate on behalf of the power which appointed them or of which they are subjects or citizens, although they are forbidden so to act for any other power. In the next place they receive their honorarium as arbiters directly from the parties, and rightly, because they are servants of the parties and are properly remunerated by them. The judges of the proposed Court of Arbitral Justice are officers of the court, and although they do not lose their citizenship by virtue of their appointment, still for the purposes of justice they are officers of the community of nations.



It has been stated that the court contemplated by the convention is to consist of a sufficient number of judges to represent the various juridical systems of the world and capable of insuring continuity in jurisprudence of arbitration. This court, which we shall suppose to be composed of approximately fifteen judges, is to meet in session at The Hague once a year and is to remain in session until all the business presented to its consideration has been transacted. But the desire of the framers of the convention was not merely to propose a court which would meet once a year, but to establish a court that would be permanently in session at The Hague in order that it might receive cases and judge them without the delay incident to the appointment and assembling of judges. Therefore, it was provided that the large court, which was to meet once a year, should nominate annually from its members three judges to form a special delegation and three deputies to replace them should the necessity arise. The large court, therefore, is authorized—indeed required—to appoint a judicial committee to which may be referred cases permitting summary procedure, and the delegation is likewise competent to act as a commission of inquiry. The idea of a small committee within the larger court was suggested by the Russian proposal, previously described, and the presence of this judicial committee at The Hague, not merely ready but anxious to decide controversies submitted to them, offers to the nations of the world a simple remedy and adequate means for the judicial settlement of any controversy susceptible of judicial settlement. Through the effort of the French delegation in 1899, Article 27 of the convention for the pacific settlement of international disputes, provided that strangers to a controversy might suggest to the parties in conflict recourse to the Permanent Court. The adoption of this convention would give practical effect to this article by providing permanent judges at The Hague to whom the parties in controversy might be referred. A reason not already mentioned for the comparatively large number of judges in the general court is that each additional judge is a guaranty of impartiality. The judi-

cial committee consisting of three should be by its composition saved from the suspicion of partiality. Therefore, it is provided that the member of the delegation can not exercise his duties when the power which appointed him or of which he is a national is one of the parties.

To return to the court itself. Although the project requires that the court shall meet in session once a year, it was not meant that the judges of the court should go to The Hague unless the docket of the court would justify it. Therefore, it is provided that the court shall not meet in session if the delegation considers that such meeting is unnecessary; for it may be that the judicial committee is competent to transact the business and that there are no cases on the docket for the consideration of the court. Lest, however, the judicial committee should endeavor to perpetuate itself and, from selfish motives, be led to adjourn the meeting of the court, it is provided (Article 14) that the court shall be convened upon the request of a Power, party to a case actually pending before the court, the pleadings in which are closed or which are about to be closed. The discretion therefore lodged in the delegation is subject not merely to the supervision but to the control of the powers in litigation. It may happen, however, that a case presented to the delegation is of such fundamental importance that this smaller body does not feel justified in deciding it. Therefore, it is provided that the delegation may, in case of necessity, summon the court in extraordinary session. The foundation, therefore, is laid for a court which is to meet annually if the business before it justifies a session. A judicial committee is to be selected annually by the court, by ballot if in session at The Hague or by mail if not so in session. The judicial committee is permanently in session at The Hague to undertake any and all business presented to it by agreement of the Powers. It is further provided in the interests of the litigants that the members of the delegation are to complete all matters submitted to them, even if the period has expired for which they have been appointed judges.

As the court thus outlined is to be the court of the contract-

ing nations, it is very necessary that its proceedings be known to the nations. Therefore, it is provided that a report of the proceedings shall be drawn up every year by the delegation and forwarded by the International Bureau to the contracting powers. In this way the proceedings of the court are forced upon the attention of the Signatory Powers and they are thus in a position to appreciate the importance of its labors and to exercise general control and supervision.

Passing, now, from the organization of the court, let us consider its jurisdiction and procedure. The jurisdiction of the court is purposely very large, because it is hoped that it will draw to itself all controversies between nations susceptible of judicial settlement. The court should be empowered to consider all such questions submitted, but such questions will not be presented unless the judgments of the court not only win but merit universal approval. The Court of Arbitral Justice is therefore declared competent to deal with all cases submitted to it in virtue either of a general undertaking to have recourse to arbitration, or of a special agreement. The original draft of this article was divided into three paragraphs by virtue of which the court was declared to be competent:

1. For all cases of arbitration which by virtue of a general treaty concluded before the ratification of this convention may be submitted to the Permanent Court of Arbitration, unless one of the parties opposes; 2, for all cases of arbitration which by virtue of a general treaty or special agreement may be brought before it; 3, [upon the proposal of Germany and the United States] for the revision of awards of tribunals of arbitration and reports of commissions of inquiry, as well as for the determination of the rights and duties which arise therefrom in all cases in which the parties apply to the court for this purpose by virtue of a general treaty or special agreement.

The purpose of the original draft was to invest the Court of Arbitral Justice with the functions of a court of appeal, provided parties in litigation chose to make use of its services, and that there might be no misunderstanding in the matter the German-American draft clothed it specifically with this character. It was thought advisable to point out the possibil-

ity of revision, although merely stating that it might be used for such a purpose did not in any way bind the nations to use it for such. The presence, however, of the clause might suggest a resort to the court for the purposes of revision by the mere statement of the competency of the court. Its presence therefore called attention to its possibility, and by so doing exerted a slight moral pressure. The Committee of Examination, however, did not share the views of the German and American delegation as to the advisability of retaining the clause, although it was specifically admitted and stated to be the understanding of the committee that the court might be used for the purposes specified in the rejected clause by virtue of a special accord.

The judges of the court are declared competent to exercise the functions of judge in the International Prize Court, and it is not too much to hope that some day, either by the appointment of the same judges for both courts or by a reorganization, there may be one great international court of justice with a twofold division into civil and prize chambers.

Passing, now, to the delegation, it appears that this latter body is competent to settle the *compromis* referred to in Article 52 of the revised convention for the pacific settlement of international disputes if the parties are agreed to leave its formulation to the court. There can be no objection to this, because the delegation does not act upon its own initiative, but solely by the agreement of the parties in interest. The fact that they are strangers to the controversy and are not affected by its failure or success makes their coöperation disinterested and therefore acceptable.

Another function of the judicial committee was the subject of much discussion at the Conference, namely, the provision of Article 19 of the project declaring the delegation competent to settle the *compromis*

even when the request is only made by one of the parties concerned, if all attempts have failed to reach an understanding through the diplomatic channel, in the case of—



1. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, providing for a *compromis* in all disputes and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the delegation. Recourse can not, however, be had to the court if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the Arbitration Tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one power by another power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.

As this clause appears in substantially the same form as Article 53 of the convention for the pacific settlement of international differences, and as it has been amply considered, I do not again discuss it at length or in detail. It may be pointed out, however, that the delegation is only competent to settle the *compromis* arising under a treaty of arbitration concluded or renewed after the ratification of the convention. Its effect, then, is prospective, not retroactive, and it can only settle the *compromis* if the treaty of arbitration does not either explicitly or implicitly exclude the settlement of the *compromis* from the competence of the delegation. Nations may either frame their own *compromis* or permit its formulation by the court or its delegation. In other words, the contracting powers may exclude in express terms the competence of the delegation, or may impliedly exclude the delegation by providing another or inconsistent means of settling the *compromis*. For example, in the treaties of arbitration recently concluded by the United States, it is provided that

such special agreements (*compromis*) on the part of the United States, will be made by the President of the United States, by and with the advice and consent of the Senate thereof.

The competence of the court or its delegation is thus specifically excluded by the United States. It should be also noted that the competence of the delegation is further limited if the

other party declares that the dispute does not belong to compulsory arbitration, unless the treaty of arbitration itself confers upon the arbitral tribunal the power of deciding this preliminary question. It is difficult to see how this article, thus safeguarded, can be other than helpful to parties in litigation. If they are unwilling to intrust the court or its delegation with the formulation of the *compromis*, they may exclude it. If they have not excluded the competency of the court, either directly or impliedly, the fact that the court may assume jurisdiction, upon demand of one of the parties to the conflict, will exert no little pressure upon the unwilling party to secure a *compromis* by negotiation rather than by judicial decision. If nation could sue nation by filing with the court a complaint there would be no necessity for a *compromis*. But the competence of the court or its delegation to frame the *compromis*, upon the request of one litigant when a treaty of arbitration exists between the litigants binding them to arbitrate, seems to be a long step toward introducing into the law of nations the procedure of a common-law court by which a defendant may be brought into court at the instance of a plaintiff.

Section number 2 of the article in question is intimately connected with the convention for the limitation of the use of force in the collection of contract debts. It will be recalled that the renunciation of force is conditioned upon arbitration, but it may well be that the parties in controversy agree to arbitrate but that either creditor or debtor may delay framing the *compromis*. If the *compromis* be not framed the agreement to arbitrate is worthless; if either party possesses the right to delay its framing, it may never be framed and the agreement to arbitrate becomes a dead letter. In order not merely to enable but to force a party agreeing to arbitrate to formulate the *compromis*, the delegation is made competent to do so upon the demand of either party, unless the acceptance of arbitration is subject to the condition that the *compromis* should be settled in some other way. The procedure is thus wholly voluntary, for the intervention of the court or its delegation depends solely upon the parties who may directly or

indirectly exclude the competence of court and delegation alike.

It has been stated that the delegation may sit as a court administering summary procedure, in accordance with the convention for the pacific settlement of international disputes, and that it may exercise the functions of a commission of inquiry as created under the same convention. The commission of inquiry is not a court; it finds facts—it does not declare nor does it apply law. For this reason, with the assent of the parties concerned, the members of the delegation who have taken part in the inquiry may sit as judges if the case in dispute is submitted to the arbitration of the court or the delegation itself. (Article 18.) If the judicial committee composed of three members be considered too small a body, each of the parties concerned in litigation may nominate a judge of the court to take part with power to vote in the examination of the case submitted, and if the delegation is acting as a commission of inquiry, each party litigant may add a person chosen outside of the court. This privilege is not inconsistent with the provisions of the convention, because, as previously stated, the commission of inquiry finds facts: it does not deliver judgments. It should be clearly understood, however, that if the delegation sit as a law court none of its members can be citizens or subjects of the parties in controversy.

The intention of the framers of the project was to provide a court of broad jurisdiction, to appoint competent judges, ready and willing to take up their residence, if need be, at The Hague, and to designate a small judicial committee always in session at The Hague for the trial of cases. By permitting the delegation or its members to act as a commission or commissioners of inquiry, it was expected to enlarge the usefulness of the judges, and if the contracting powers are impressed by the impartiality and ability of the court as a whole, of its judicial committee, and of the individual judges composing the court, the court and the delegation will doubtless have cases to decide, and the individual judges may be detailed to sit on special commissions or tribunals of arbitration at the request

of the nations without involving extra expense. It should be noted that the Court of Arbitral Justice is limited to the contracting powers. The Court of Arbitration of 1899 was open to nonsignatory Powers if the parties agree to submit to its jurisdiction. (Article 26.) The reason for the difference is two-fold: (1) Financial, for the Court of Arbitral Justice is a court organized and supported by the Contracting Powers, and there seems to be no sufficient reason why these Contracting Powers should contribute judges for those who are unwilling to assume their share of the burden; (2) that the Contracting Powers did not wish to interfere with the Permanent Court of Arbitration by furnishing a tribunal free of expense to litigants.

The remaining provisions of the project concern matters of procedure and, although interesting, are not fundamental. Without going into details, it may be said that the Court of Arbitral Justice is to follow the rules of procedure of the convention for the pacific settlement of international disputes, where applicable (Article 22); that the court determines what language it will itself use and what languages may be used before it (Article 23); that the International Bureau serves as channel for all communications to be made to the judges during the interchange of pleadings provided for in Article 63, Paragraph 2, of the convention for the pacific settlement of international disputes (Article 24); that the discussions are under the control of the president or vice-president, freely elected by the court (Article 26); that the court considers its decisions in private and the proceedings are secret; that the decisions are reached by a majority of the judges present (Article 27); that the judgment of the court must give the reasons on which it is based and contain the names of the judges taking part in it and be signed by the president and registrar (Article 28); that each party pays its own costs and an equal part of the cost of the trial as in an ordinary law suit (Article 29); that the expenses of the court, as distinct from the expenses of the parties, are borne by the Contracting Powers (Article 31); that the court draws up its own rules of procedure, which must be communicated to the contracting parties; and that after ratifica-



tion of the present convention the court shall meet as early as possible in order to elaborate these rules, elect the president and vice-president, appoint the members of the delegation (Article 32); and, finally, that the court may propose modifications in the provisions of the present convention concerning procedure, but that such proposals are communicated through the Netherland Government to the contracting powers for their determination. (Article 33.)

The foundation for a court of arbitral justice is thus laid. The organic act consisting of its organization, jurisdiction, and procedure was approved by the Conference and recommended for adoption by the Powers generally. But the conference was unable to devise in the short time at its disposal an acceptable plan for the appointment of judges.

The Conference is, however, not to be criticised for failing to produce a satisfactory solution of the difficulty; for no acceptable solution of the problem has been yet proposed by the wit and ingenuity of man. The difficulty inherent in the problem is that States are regarded in diplomatic assemblies as equals and treated as such. The doctrine of juridical equality has been proclaimed from the days of Grotius to the present day, and doubtless has been of very great service to protect the weak against the aggression of the strong. But we can not overlook the fact, that although legally equal, the great masses of population within State lines possess influence which the smaller and less populous States do not have, and which in the business of life they do not claim. If there were but fifteen States in the world or if the Powers of the world were willing to pick out fifteen and entrust them with the formation of the court, there would be no difficulty in finding fifteen judges adequately qualified for developing and interpreting the law of nations. But the small State is as tenacious of its right as the large State, and as the large States each wish a judge, the small States would not be content with less. The result is that we can easily form a court of forty-six judges, but, as previously stated, such a body would be a judicial assembly, not a court. It seems that a court could not be composed of more than

fifteen or seventeen members without becoming unwieldly. How shall we reduce forty-six to seventeen?

Three methods, it may be said, were proposed: First, the system of rotation; second, the system of absolute and rigid equality; and, thirdly, the system of election. Of each of these in turn.

The framers of the project admitted freely the principle of the juridical equality of States, but maintained that the usage made of the court would naturally be proportioned to population, industry and commerce. They therefore proposed a court of seventeen judges. It was thought possible to reconcile the principle of juridical equality with the actual facts of daily life, by recognizing that each State, be it never so small, had the right to appoint a judge for the full period of the convention, namely, twelve years; but that the judges should sit for a longer or shorter period determined by the population, industry and commerce of the appointing countries. In this way the smallest States, such as Montenegro and Luxemburg, would be entitled to appoint judges for the full period of twelve years, although they would be called upon to sit for but one year out of the twelve. Certain larger States should sit for a period of two years; others for a period of four years; one for a period of ten years; and eight—namely, Germany, Austria-Hungary, United States, France, Great Britain, Italy, Japan and Russia—for the full period of twelve years.<sup>1</sup> By this method, which it was hoped would either prove acceptable in itself or might be modified so as to meet general approval, each State represented at the Conference would appoint a judge for the full period to serve by a system of rotation conditioned upon population, industry and commerce. It was felt that the continued presence of judges from the eight States just enumerated would supply the court with a permanent nucleus of trained judges representing the different nations, the different systems of law, the different languages, and capable of guaranteeing the continuity of arbitral jurisprudence.

<sup>1</sup> For the suggested composition of the Court of Arbitral Justice by the system of rotation, see Appendix II, pp. 818-820.

Without entering further into details, it may be said that this system of rotation was objectionable to many of the delegates represented at the Conference, although it is practically identical with the system of rotation proposed and accepted for the constitution of the Court of Prize. Subtle distinctions were drawn between the two courts, it being stated that the larger nations were more likely to go to war; that their interests either as belligerents or neutrals were greater than those of the small States; that in submitting the validity of their actions to a court composed of neutrals, the larger States conferred such a benefit upon neutrals as to compensate any particular neutral for inadequate representation, and that, therefore, the larger States were entitled to permanent representation in the Prize Court.

This argument is certainly correct, but it involves a distinction between large and small Powers based not merely upon population, industry, and commerce, but upon the naval strength of each contracting party. The most that can be said is that the smaller States were willing to be classified for purposes of claims arising out of war, but were unwilling to be classified for claims arising out of peace which if unsettled might produce war. As this system will be described in considering the Prize Court it is unnecessary to discuss it here at greater length.

The system of absolute and rigid equality in the right as well as its exercise was proposed by Brazil, and may be summed up in the formula: as many judges as there are States. According to this system, which has been explained previously, the court would be composed of forty-six judges divided by order of the alphabet into three groups, each group to sit by rotation during a period of three years. This system was not considered by the Committee of Examination, and it was withdrawn by its proposer, Mr. Barbosa, who was not in favor of the establishment of a court of arbitral justice; for he believed that the system of arbitration adopted in 1899 was sufficient for all international needs; that a court of justice implying subordination was inconsistent with the sovereignty

of nations; that a court of arbitration composed of judges of one's own choice was the only system compatible with sovereignty. He doubtless proposed this plan for the consideration of the committee in order that his attitude might not be considered as wholly negative, and to illustrate by a concrete example the kind of court consistent with the unimpaired equality of nations and the exercise of sovereignty.

The third method, based upon juridical equality of the States, both in theory and practice, was the system of election proposed by the American delegation in order to meet the objection made to the system of rotation as based upon inequality rather than upon the equality of nations. This system was remarkably clear, simple, and might well have been adopted; for it permitted each State to participate in the election and it gave to each State an equal influence in the appointment of the judges. Each State was to select a person willing to act and capable of performing judicial duties. The name of this person was to be communicated to the International Bureau, which thereupon made a list of the persons so designated by the forty-six States. The list was to be transmitted to the minister of foreign affairs of each country, with the request that he check the names of fifteen persons, supposing the court was to be composed of fifteen, best qualified to constitute the court. The papers were to be returned to the International Bureau and the fifteen persons receiving the highest number of votes were to form the court for the period of twelve years. It is difficult to see wherein this system failed to satisfy the requirement of equality or sovereignty; for equality was recognized in every step in the procedure and the election itself was the exercise of sovereignty. This system of selection and election, however, was displeasing to the larger Powers, who feared the results of combination, and it was curiously unacceptable to the smaller powers, who may have felt that the election would be conducted under pressure from the larger Powers.

The fate of the project trembled in the balance, because, if its acceptance or rejection depended solely upon an acceptable method of constituting the court, it was evident that the result



of weeks and months of labor would be lost. Therefore, it was decided to accept the project as it stood, to recommend its adoption, and to defer the establishment of the court until the Powers should agree upon a method of appointing the judges. A great result was thus achieved; for the Conference, with the exception of Switzerland, accepted unanimously the principle of a Permanent Court composed of judges representing the various juridical systems of the world and capable of insuring the continuity of arbitral jurisprudence. From the little committee room in The Hague the duty of devising an acceptable plan was transferred to the Powers at large, in the hope and belief that the wit and ingenuity of the foreign office would overcome a difficulty which, while formidable, is far from insuperable.

It is therefore abundantly clear, to quote the apt and measured language of the President in his recent message to Congress, that:

Substantial progress was made towards the creation of a Permanent Judicial Tribunal for the determination of international causes. There was very full discussion of the proposal for such a court and a general agreement was finally reached in favor of its creation. The Conference recommended to the Signatory Powers the adoption of a draft upon which it agreed for the organization of the court, leaving to be determined only the method by which the judges should be selected. This remaining unsettled question is plainly one which time and good temper will solve.

## 5. THE AMERICAN COURT OF ARBITRATION UNDER THE ARTICLES OF CONFEDERATION

It has been stated that private arbitration was one of the first steps in the development of the judicial system of Rome, and it was suggested that the forces at work in the international world will result in the establishment of an international court, permanent in nature and judicial in composition.

The insufficiency of a temporary tribunal for the settlement of disputes between independent States united by a loose feder-

ation is shown by the experience of the United States. The importance of the problem as well as the interest of the subject to the American public amply justifies a brief exposition.

The ninth article of the Articles of Confederation provided that if the agents of the States in controversy failed to agree—

Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names, as Congress shall direct, shall, in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination.

Omitting the controversy between New York, New Hampshire and Massachusetts on the one hand and Vermont on the other, in which a court was petitioned but not appointed, and a controversy between Pennsylvania and Virginia, compromised and settled out of Congress, it appears that the case of *Pennsylvania v. Connecticut* was the one case actually tried and determined by a commission appointed under Article 9 of the Articles of Confederation. The controversy between the two States, arising from conflicting charters, was long and bitter and lives were lost on both sides. Connecticut claimed the Wyoming Valley, now the county of Luzerne in Pennsylvania, under its charter, whereas Pennsylvania claimed the same territory under Penn's charter. As the result of the inability to agree, Pennsylvania on November 3, 1781, prayed "a hearing in the premises, agreeably to the ninth article of the Confederation" (ratified on March 1, 1781). At a subsequent date the agents of Pennsylvania appeared before Congress, November 14, 1781, and after some delay and opposition on the part of Connecticut a court of seven persons, of whom any five could act, was agreed to, which court in session at Trenton, N. J., on December 30, 1782, rendered the following unanimous "opinion" in favor of Pennsylvania:

We are unanimously of opinion that the State of Connecticut has no right to the lands in controversy.

We are also unanimously of opinion that the jurisdiction and preëmption of all the territory lying within the charter boundary of Pennsylvania, and now claimed by the State of Connecticut, do of right belong to the State of Pennsylvania.

In 1784 an attempt was made on the part of certain citizens of New Jersey to have a court appointed, agreeably to the ninth article, in order to settle a controversy in regard to a certain tract of land termed Indiana included in the grant of the North-western Territory made by Virginia on March 1, 1784, to the United States. Congress refused to grant the petition for a court and accepted the conveyance. It thus appears that although commissioners might be appointed by Congress for the settlement of controversies between the States in accordance with the provisions of the ninth article, Congress claimed and exercised its discretion either to appoint or refuse to appoint commissioners. The remedy sought to be provided by the article was thus inadequate, and proceedings under the article did not commend themselves highly to the States in controversy, for in various instances the case was compromised even although a court had been appointed for its consideration, as in the case of *Massachusetts v. New York*.

Massachusetts claimed jurisdiction over a tract of land between 42° 2' N. and 44° 15' N., extending westwardly to the Southern Ocean, which claim was denied in part by New York. Unable to agree, Massachusetts prayed

that a Federal court may be appointed by Congress to decide a dispute between the said Commonwealth and the State of New York.

(June 3, 1784). The parties appeared by their agents (December 8, 1784) and were

directed to appoint, by joint consent, commissioners or judges "to constitute a court for hearing and determining the matter in question, agreeably to the ninth of the articles of confederation and perpetual union."

A court of nine commissioners was agreed upon (June 9, 1785) by the agents of the litigant parties, and the commis-

sioners were notified to meet at Williamsburg, Va., on the third Tuesday of November, 1785, to hear and determine the controversy. The court, however, did not meet, as Massachusetts and New York subsequently notified Congress that the controversy was

settled and determined by an agreement entered into on the 16th day of December last (1786), by the agents of the said States.

As the case of *Pennsylvania v. Connecticut* is the only case in which the court of arbitration constituted by the parties "agreeably to the ninth article" rendered an "opinion," so the case of *South Carolina v. Georgia* offers the only instance under the Articles of Confederation of the formation of a court by alternately striking from a congressional list until the number was reduced to thirteen, as provided by the ninth article. The State of South Carolina claimed certain lands; the State of Georgia likewise claimed the territory in dispute. Unable to settle the controversy by direct negotiation, they appealed to Congress. Therefore, on June 1, 1785, Congress resolved

that the second Monday in May next be assigned for the appearance of the States of South Carolina and Georgia by their lawful agents; and that notice thereof and of the petition of the legislature of the State of South Carolina be given by the Secretary of Congress to the legislative authority of the State of Georgia.

The time of appearance having been extended, the agents of each State appeared before Congress on Monday, September, 4, 1786, and were directed

to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question, agreeably to the ninth article of Confederation and perpetual union.

Unable to agree upon the composition of a court, upon motion of the delegates of Georgia (September 13, 1786), it was resolved that Congress proceed to strike a court in the manner pointed out by the Confederation.



In accordance, therefore, with this provision three persons were named from each State and by alternate striking reduced to thirteen. Upon motion of South Carolina these names were put in a box and the following nine names were drawn out in the presence of Congress: Alexander Contee Hanson, James Madison, Robert Goldsborough, James Duane, Philemon Dickerson, John Dickinson (the author of the article), Thomas McKean, Egbert Benson and William Pynchon. The first Monday in May, 1787, was fixed for the meeting of the court at New York. A court thus composed would have been excellent and its decision entitled to respect. There is no evidence, however, that it sat, as the case was settled by a compact between the two States.

The net result of procedure under Article 9 was the trial and final determination of one case (*Pennsylvania v. Connecticut*); the appointment by mutual agreement of commissioners in two controversies, settled, however, out of court (*Massachusetts v. New York*; *South Carolina v. Georgia*); with petitions for the appointment of a court in some three other cases. The temporary tribunal was unsatisfactory. It was difficult to constitute, it rendered but one "opinion," and it failed to appeal either to the imagination or judgment of the public. Therefore, when the Constitutional Convention met in 1787 in Philadelphia, and it was proposed to retain the ninth article and incorporate it in the Constitution, the proposal met with no favor and was unanimously rejected. Arbitration with judges of their own choice was discarded by States as jealous of their rights in convention as any at the recent Conference at The Hague, in favor of a permanent Supreme Court, composed of judges acting under a sense of judicial responsibility, for the settlement of controversies which might lead to war between independent and sovereign States.<sup>1</sup> Arbitration which failed for thirteen States has been replaced by a judiciary which succeeds for forty-six States. Does not the experience of the United States offer at once a hope and a precedent?

<sup>1</sup> *Missouri v. Illinois*, 200 U. S. 496, 518 (1905).

## CHAPTER X

### THE CONVENTION FOR THE ESTABLISHMENT OF AN INTERNATIONAL COURT OF PRIZE<sup>1</sup>

The convention creating an international prize court is perhaps the most distinctive work of the Conference. It aroused great opposition. It has been widely discussed in the British and somewhat in the American press. There are divergent views about its value and the probability of its being generally accepted by the Powers. But there can be no doubt whatever that its adoption by the Conference was a great step in advance although it should fail of ratification, because it is a recognition of the fact that questions affecting neutrals and conflicts arising out of the violation of neutral rights are of such a nature as to be susceptible of final adjustment in an international court of prize. It is a first step toward the establishment of an international judicial system. The difficulty is the first step; the advantage of the first step is that you cannot retreat when you have taken it; for if the provisions of the prize court are faulty they will be corrected, either by diplomatic correspondence or at a subsequent conference. The principle is recognized and it cannot be rejected or discarded.

The prize court has, however, a claim upon us apart from its intrinsic importance, because it is the first really important

<sup>1</sup> For a discussion of the problems involved in the International Court of Prize, see the following excellent articles: (1) The Proposed International Prize Court, by former Justice Henry B. Brown, *American Journal of International Law* (1908), Vol. II, pp. 476-489; (2) The Proposed International Prize Court and Some of its Difficulties, by Charles Noble Gregory, *ibid.*, pp. 458-475; (3) Constitutionality of the Proposed International Prize Court, considered from the standpoint of the United States, by Thomas Raeburn White, *ibid.*, pp. 490-506.

world judiciary. International justice requires an international court, and peace, as well as war, will in time claim its permanent tribunal at The Hague. Lest the importance of the Prize Court be not fully appreciated from this point of view, I hasten to add that the Second Conference, as will be seen later, accepted the idea of a periodic conference, and as an international conference is a quasi-legislative body recommending its conclusions *ad referendum* to the Powers, it is evident that a second step has been taken towards the international organization of the world's affairs. A judiciary and a legislature are not wholly dreams: they are gradually assuming tangible and visible forms. Do these two institutions foreshadow an international executive? Who may say? We shall undoubtedly create various institutions to satisfy our international needs, and if the federation of the world be an international need, no doubt it will come. As yet the unaided vision fails to discover it.

#### 1. PRIZE COURTS ARE INTERNATIONAL IN THEORY, BUT MUNICIPAL OR NATIONAL IN FACT

To revert to the subject in hand. The fundamental principle of the Prize Court is that the interests of neutrals should be safeguarded by neutrals, that the propriety or impropriety of the capture of neutral property should be decided not by the captor in his own court but by the neutrals in a neutral court. Heretofore the captor has passed upon the validity of capture, with every presumption in favor of its rightfulness. The burden is placed upon the claimant and the court in which the proceeding is brought is a court of the captor. His judges, however upright and well informed, can with difficulty escape prejudice and national bias. The underlying principle of the prize court is that the neutral shall not merely be represented upon the court, but that the majority of the judges shall belong to neutral nations. The belligerents, however, are not forgotten, nor are their legitimate interests overlooked, because each belligerent is represented during the trial of the

case. His representation is, however, not controlling. He is present in order to explain the law and customs of his country, to justify the decree of his court, and to aid in reaching a proper judgment. He is not present in order to dominate the court and, in ultimate resort, to secure the application of the local law. The neutral has at last made his appearance as the chief party in interest; and properly, for war is a matter between the belligerents and it should be confined to them as far as possible. The belligerent is not inclined either in theory or in practice to protect the neutral. The neutral has been forced to protect himself. The conflict has been long but the victory is complete. The neutral has secured the recognition of his rights and is in a position to dictate to the belligerent. The majority is at last to control the minority. An international court of appeal in prize cases is to administer justice at The Hague, consisting of fifteen judges, the majority of whom are neutrals and who may be trusted to protect and safeguard the rights of neutrals; but the presence of a judge representing each belligerent is a guarantee that the interests of the belligerent have not been disregarded. Two interests struggle for mastery and recognition; the Prize Court is a compromise, but a very happy compromise between the interests of the neutral and the belligerent.

The reason for the establishment of a court of prize is that prize law is municipal law in the highest sense of the word; that as municipal law it is administered in the municipal courts and the rightfulness or wrongfulness of the capture, involving, it may be, the confiscation of neutral property, is passed upon by the captor, who naturally is anxious to support the capture rather than discredit the officers who made it. The theory of the International Prize Court is the reverse of this, namely that neutral interests are at least equal if not superior to the rights of belligerents; that the rightfulness or wrongfulness of the capture or confiscation of neutral property should be decided ultimately by those who have no overwhelming interest in the justification of the capture; that as captors in



the past have failed to protect neutral interests, the time has come for neutrals to insist upon the establishment of an impartial tribunal to safeguard their rights, but that in such tribunal, so that it be not one-sided and therefore merit the criticism of the municipal prize courts, the other party in interest to the capture, namely the belligerent, shall be represented, so that by a free and fair exchange of views, a careful and impartial examination of the facts in controversy, a careful discussion of the rule and the reason underlying it, a judgment shall be rendered, not by the captor, nor indeed by the neutral, but by a court composed of jurists representing both interests. It would seem that the institution thus constituted is indeed a very happy one, and that its establishment and successful operation would go far to protect the neutrals who heretofore have had their rights disregarded in moments of great national excitement.

It is constantly asserted and maintained that a Prize Court is an international tribunal, although sitting in a particular nation and officered by judges of its choice; that the law administered by it is international law, and that its decisions being judgments *in rem* are recognized the world over and bind the property into whose hands so ever it passes. The law reports of Great Britain and the United States abound in such statements, and the weighty names of Lord Stowell and Chief Justice Marshall support the doctrine. For example, in *The Maria* (1 C. Robinson 340) decided in 1799, Lord Stowell, then Sir William Scott, said:

In forming that judgment, I trust that it has not escaped my anxious recollection for one moment that it is that the duty of my station calls for from me—namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent States, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would deter-

mine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question—a question regarding one of the most important rights of belligerent nations relatively to neutrals.<sup>1</sup>

In the *Recovery* (6 C. Robinson 348) the same learned authority pointed out that the court was municipal as well as national, and as such national court applied a municipal statute or ordinance to the Briton although such statute or ordinance would not affect the foreigner.

The court of admiralty is a court of revenue in one of its branches. . . . But I am now sitting in a court of prize and the prayer that is addressed to that court is, that it would inflict the penalty of the revenue court on a foreign ship and cargo, that is brought before it on a seizure of war. I should have been glad to have heard under what authority the court of admiralty could mingle its jurisdiction in this matter. As to the authority of precedents, I will take on myself to say, that there are none. The cases that have been mentioned were not of that description. . . . What they did was only to reject the claim of British subjects in a Prize Court, in a transaction which evidently showed those individuals to have been acting in violation of the laws of their country, which they were bound to observe. That is a well-known doctrine, recently introduced, and which has not been applied without leaving considerable difficulties behind it. . . . But there is no instance in which the same principle has been applied to foreigners. In some cases it has been pressed in argument, the court has invariably resisted the application and there are many reasons which would make me very unwilling to take on myself the extension of the principle, without having it imposed upon me by the authority of the Superior Court. It is a question of very great importance, and if all other considerations were out of the way, a sense of propriety alone would deter me from extending the principle in a case, in which it came only incidentally and indirectly before me. It is asked, if you apply such a principle to the claims of British subjects, why not also to those of other nations? Some

<sup>1</sup> This court is properly and directly a court of the law of nations.—Per Sir William Scott, 2 C. Robinson 77, 1799.

distinctions are obvious. In the first place it is to be recollected, that this is a court of the law of nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it, is the administration of the law of nations, simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which, it is well known, they have at all times expressed no inconsiderable repugnance. In the case of a British subject it is different. To him it is a British tribunal, as well as a court of the law of nations; and if he has been trampling on the known laws of his country, it is no injustice to say, that a person coming into any of the courts of his own country, to which he is naturally amenable, on such a transaction, can receive no protection from them. This difference of situation does, I think, afford a sound and material distinction. As to foreign nations and their subjects, the breach of our prohibitions of trade are merely *mala prohibita*; it is an offense against the peculiar law of this country, which they may justly demand to have tried more directly under that system of law to which it properly belongs. With respect to a British subject, the violation of the laws of his own country carries with it also the *malum in se*; and therefore it is no injustice to him, that his claim should be subject to rules, which this court may not think itself at liberty to apply to the subjects of foreign States.

In a later case, *Fox and others* (Edwards 312), the same great judge said:

This court is bound to administer the law of nations to the subjects of other countries in the different relations in which they may be placed towards this country and its government. This is what others have a right to demand for their subjects, and to complain if they receive it not. This is its unwritten law, evidenced in the course of its decisions, and collected from the common usage of civilized States.

In the American case of the schooner *Adeline* (9 Cranch 244) it is said:

The court of prize is emphatically a court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country.

Attorney General Speed expresses the same doctrine in a single sentence:

Prize courts are tribunals of the law of nations and the jurisprudence they administer is a part of that law.<sup>1</sup>

But these statements are but half-truths, pleasing fictions at variance with the real state of affairs. The prize judge is not merely bound to administer the law of nations; his oath requires him to consider and apply the statutes and ordinances of his country even when these are at variance with the law of nations. For example, Lord Stowell held himself bound in the case of *The Walsingham Packet* (2 C. Robinson, 77, 1799) to administer in his court of nations the municipal law of England in a case affecting a British ship, and in the later case of the *Fox* (Edwards 311, 1811) he extended the orders in council to an American neutral vessel.<sup>2</sup>

The American doctrine is identical:

Prize courts are subject to the instructions of their own sovereign. In the absence of such instructions their jurisdiction and rules of decision are to be ascertained by reference to the known powers of such tribunals and the principles by which they are governed under the public law and the practice of nations.<sup>3</sup>

It thus appears that the statement so solemnly proclaimed by Lord Stowell and echoed in American jurisprudence that a Prize Court is "properly and directly a court of the law of nations" must be understood in the sense that it is a court acknowledged by the law of nations for the administration of international law, but that it is municipal in locality and organization and bound by its very nature to administer the municipal law of its sovereign and constituting authority.

Even if this were not so it is the court of the captor, and its judges are but men prone to sympathize with their country and to justify its actions in time of war. But the State is and

<sup>1</sup> 11 Opinions Atty.-Gen. 445 (1866).

<sup>2</sup> For a careful analysis of Lord Stowell's judgments and the steps by which he converted an International Prize Court into a Municipal Court of Great Britain, see an article in the *Edinburgh Review* for February, 1812, entitled *Disputes with America*, Vol. XIX, p. 290; *Moore's Int. Law Digest*, Vol. 7, pp. 648-651.

<sup>3</sup> *The Amy Warwick* (2 Sprague, 123).



must be responsible to the neutral for any deviation from neutral rights as defined and recognized by international law, and, although the municipal law or ordinance will be a good defense to the judge, it is of no avail to the neutral for the reason pointed out by Chief Justice Marshall, that "as no nation can prescribe a rule for others, none can make a law of nations."<sup>1</sup>

The nationalization of a Prize Court deprives its decision of international respect and authority.

The instant that a court sitting to administer international law recognizes either governmental orders or proclamations setting forth governmental policy as constituting rules of that code, at once that court ceases in fact to administer in its purity that law which it pretends to administer. . . . The function of the tribunal has undergone a change which is justly and inevitably fatal to its weight and influence with foreign powers. It is not only a degradation of the court itself, but it is a mischievous injury to the government which has destroyed the efficiency of an able ally.<sup>2</sup>

This unsatisfactory state of affairs has frequently led to the suggestion that an International Prize Court be established. I quote a brief statement of the various proposals from Dr. Oppenheim's excellent *Treatise on International Law*:

The first proposal of this kind was made in 1759 by Hübner,<sup>3</sup> who suggested a Prize Court composed of judges nominated by the belligerent and of consuls or councilors nominated by the home State of the captured neutral merchantmen. A somewhat similar proposal was made by Tetens<sup>4</sup> in 1805. Other proposals followed until the Institute of International Law took up the matter in 1875, appointing, on the proposal of Professor Westlake, at its meeting at The Hague, a commission for the purpose of drafting a "*Projet d'organisation d'un tribunal international des prises maritimes.*" In the course of

<sup>1</sup> The *Antelope* (10 Wheaton, 66, 122, 1825).

<sup>2</sup> 5 *American Law Review*, 225; *Moore's Int. Law Digest*, Vol. VII, p. 648.

<sup>3</sup> *De la saisie des bâtiments neutres* (1759), Vol. II, p. 21.

<sup>4</sup> *Considerations sur les droits réciproques des puissances belligérantes et des puissances neutres sur mer, avec les principes du droit de guerre en général* (1805), p. 62.

time there were in the main two proposals before the Institute, Westlake's and Bulmerincq's. Westlake proposed<sup>1</sup> a Court of Appeal to be instituted in each case of war, which should consist of three judges—one to be nominated by the belligerent concerned, another by the home State of the neutral prizes concerned, and third by a neutral Power not interested in the case. According to Westlake's proposal there would therefore have to be instituted in every war as many Courts of Appeal as neutrals are concerned. Bulmerincq proposed<sup>2</sup> two Courts to be instituted in each war for all prize cases—the one to act as Prize Court of the First Instance, the other to act as Prize Court of Appeal, each Court to consist of three judges—one judge to be appointed by either belligerent, the third judge to be appointed in common by all neutral maritime Powers. Finally, the Institute agreed at its meeting at Heidelberg in 1887 upon the following proposal, which embodied in §§ 100–109 of the *Règlement international des prises maritimes*.<sup>3</sup> At the beginning of a war either belligerent institutes a Court of Appeal consisting of five judges, the president and one of the other judges to be appointed by the belligerent, the three remaining to be nominated by three neutral Powers, this Court to be competent for all prize cases.<sup>4</sup>

## 2. QUESTIONS INVOLVED IN AN APPEAL FROM A NATIONAL TO AN INTERNATIONAL COURT

Thus the matter stood at the opening of the Second Hague Conference, but the initiative of Germany and Great Britain and the support of the United States and France resulted in a careful and thoughtful project for the establishment of an International Prize Court, adopted by the Conference and deserving the approval of the community of nations.

The preamble to the Prize Court explains, in general, the reasons which led to its adoption:

Animated by the desire to settle in an equitable manner the differences which sometimes arise in the course of a naval war in connection with the decisions of National Prize Courts;

Considering that, if these courts are to continue to exercise their functions in the manner determined by national legisla-

<sup>1</sup> See *Annuaire*, II (1878), p. 114.

<sup>2</sup> See *R. I.*, XI (1879), pp. 191–194.

<sup>3</sup> *Annuaire*, IX (1887), p. 239.

<sup>4</sup> *Oppenheim's International Law*, Vol. II, pp. 478–480.

tion it is desirable that in certain cases an appeal should be provided, under conditions conciliating, as far as possible, the public and private interests involved in matters of prize;

Whereas, moreover, the institution of an International Court, whose jurisdiction and procedure would be carefully defined, has seemed to be the best method of attaining this object;

Convinced, finally, that in this manner the hardships consequent on naval war would be mitigated; that, in particular, good relations will be more easily maintained between belligerents and neutrals and peace better assured.

The Prize Court convention may be divided into three great groups: the first part of the convention dealing with matters of general concern and interest, the second division relating to the organization of the international court of prize, and the third dealing with the procedure to be followed before the court. Of each of these in turn:

In the first place, a Prize Court might be established at The Hague to take original jurisdiction of all cases of maritime prize. In such a case this court would be a court of first instance, and would necessarily exclude the competence of the municipal courts of the various countries. In the next place, the court of prize at The Hague might be a Court of Appeal, that is to say, the municipal courts of the various countries might entertain questions of prize and pass upon them in the first instance, leaving to the claimant a right of appeal to The Hague Court after national justice had been exhausted. In case of an excess of jurisdiction or in case of a denial of justice or great dissatisfaction with the judgment of the Municipal Court, an appeal would lie to the court at The Hague. Again, there might be a compromise between the extremes, namely, an appeal to the court at The Hague from the judgment of a Municipal Court of First Instance, without allowing an appeal to the National Court of last Instance. One country, namely, Brazil, preferred the establishment at The Hague of a court of original and exclusive jurisdiction, but this view received no encouragement.<sup>1</sup>

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, Vol. II, First. Commission, Second Sub-Commission, 2d Session, July 4, 1907; Actes et Discours de M. Ruy Barbosa, p. 10.

Finally, there might be an examination *de novo* of the question involved in the judgment of the National Court irrespective of such judgment, and the decision of the international tribunal would be final between the litigating nations. In this way the controversy would be decided upon its merits without affecting the national judgment. This is familiar practice in prize cases submitted to international commissions, such as the commissions constituted under Article VII of Jay's Treaty between Great Britain and the United States signed November 19, 1794, and under Articles XII-XVII of the treaty of Washington of May 8, 1871. The national judgments are necessarily involved and are considered by the commission, but the determination of the commission is neither an affirmation nor a reversal of the national judgment. The mixed commission is a Court of Arbitration, not a Court of Appeal. This method was not, however, presented to nor discussed by the Conference. Its adoption would have obtained substantially the same results as a Court of Appeal in prize cases without involving delicate and intricate questions of constitutional law.

The second project, namely, that the justice of the national courts should be exhausted and an appeal should lie from the final decision of the National Court was the favorite project of Great Britain and was concurred in by the American delegation for the following reason: The courts of Great Britain have made very much of the maritime law of the world; the Supreme Court of the United States has followed precedents of Great Britain and in some cases has extended their doctrine. Anglo-American jurisprudence, therefore, having played so important a part in prize law, it seemed advisable to exhaust the local jurisdiction before an appeal be taken, because it is to be presumed that the decision of the final court of each of the two countries would correct any error of the inferior courts so that there might be no need of appeal, or, if the necessity existed, the judgment of the final court of Great Britain as well as the judgment of the Supreme Court of the United States would be a great aid in the argu-



ment of the case before the court at The Hague. Great Britain, therefore, refused to consent to an intermediate appeal, and, as previously said, the United States shared this view.

In the course of discussion it appeared that in Great Britain and the United States there is but one appeal—in Great Britain an appeal from the Admiralty Court to the court of last resort, and in the United States an appeal directly from the District Court to the Supreme Court, whereas in other nations there are intermediate appeals. Therefore, in order to satisfy what seemed the legitimate desire of the two countries in question, a compromise was effected so that municipal courts should entertain the cause in the first instance with one national appeal (Article 6).

Within what time should the municipal courts terminate their examination and reach a decision? The inconvenience of requiring the justice of the national courts to be exhausted is twofold, first that it involves great expense before reaching a final decision and, secondly, that great delay inevitably intervenes. The interest of the neutral is not merely that his case shall be decided correctly but rapidly, because vast sums of money are engaged and a vessel rotting in the harbor is of no use. Therefore, it was decided that the jurisdiction of the national tribunals, whether the municipal courts be exhausted or not, should not extend beyond a period of two years, which period was determined by the American delegation after a careful examination of the appeals from the District Courts arising out of captures made in the late Spanish-American War. Within two years all the appeals in prize cases were taken and the final decisions of the Supreme Court handed down.

It was therefore decided that the court at The Hague should not be invested with original jurisdiction, but that it should sit as an appellate court. A country preferring one national appeal is not compelled to submit the case before a rehearing in an Appellate Court, but as there were other countries willing to permit an appeal from the National Court of First Instance, a very happy compromise was reached in Article 6 of the convention.

When, in accordance with the above Article 3, the International Court has jurisdiction, the national courts cannot deal with a case in more than two instances. The municipal law of the belligerent captor shall decide whether the case may be brought before the International Court after judgment has been given in first instance or only after an appeal.

If the national courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Court.

It is a question which view will appeal to the American people. Every country is asked to give up something. Each country is asked to surrender the right of passing finally upon the validity of capture. A very grave question presents itself whether or not the United States will wish an appeal to be taken from the Supreme Court, and to have the judgment of the Supreme Court confirmed or reversed by an international court of appeal. It may be that the duly constituted authority of this country, if it does not wholly reject the idea of appeal and is willing to consent to the establishment of a Prize Court, may prefer to allow an appeal directly from the court of first instance, namely, the District Court, to the court at The Hague. If the idea prove at all acceptable, it is, however, a simple matter by legislation to decide which is the proper form and to provide the necessary rules for perfecting the appeal.

It is indeed something new to submit a decision of a United States court to a foreign court, an international tribunal, but it is not wholly unknown, although it is unknown in this direct form. To quote a familiar instance. By the Treaty of May 8, 1871, between Great Britain and the United States for the settlement of claims arising out of the Civil War, it was provided in Articles 12, 13 and 14 that claims of subjects of Great Britain against the United States arising out of transactions beginning in 1861 and ending in 1865, should be presented to a mixed commission, and it is a fact that to this mixed commission, composed of an American, British and Italian member, numerous claims were presented by the British Government on behalf of its subjects, which had been settled

by a final adverse judgment of the Supreme Court of the United States; and it is a fact that the mixed tribunal in six well-known cases awarded full compensation to the claimants notwithstanding the existence of the judgment of that august tribunal; and it is a further fact that the United States Government paid the awards of the commission.<sup>1</sup> Therefore, it occurs to some, indeed it occurred to the American delegation last summer, that that which had been done by a special treaty might be done by a general one, and what had been done indirectly, namely, by submitting the claim, might be done directly by submitting the judgment; because disguise it as we may, the fact is that the claim is an appeal from the judgment of the Supreme Court of the United States; for the submission of a claim, passed upon finally by the Supreme Court, questions the judgment of the court, although it does not technically reverse it. The judgment of the Supreme Court in a prize case is not final, although conclusive, between the parties to the record. The question, not the judgment, is reopened and determined, notwithstanding the judgment of the Supreme Court. The question, not the judgment, is the basis of discussion; but the judgment of the court is involved

<sup>1</sup> The following cases upon which decisions had been rendered by the Supreme Court of the United States were afterwards submitted to arbitration by the United States under the British-American Claims Convention sitting under Article 12 of the Treaty of Washington for decision "according to justice and equity:"

1. Cases in which the international tribunal decided adversely to the decision of the Supreme Court of the United States, which international decisions were obeyed by the United States. The *Hiawatha*, 2 Black, 635, 4 Moore's International Arbitrations, 3902; The *Circassian*, 2 Wallace, 135, 4 Moore, 3911; The *Springbok*, 5 Wallace, 1, 4 Moore, 3928; The *Sir William Peel*, 5 Wallace, 517, 4 Moore, 3935; The *Volant*, 5 Wallace, 179, 4 Moore, 3950; The *Science*, 5 Wallace, 178, 4 Moore, 3950.

2. Cases in which the decision of the international tribunal upheld the decision of the Supreme Court of the United States: The *Peterhof*, 5 Wallace, 28, 4 Moore's International Arbitrations, 3838; The *Dashing Wave*, 5 Wallace, 170, 4 Moore, 3948; The *Georgia*, 7 Wallace, 32, 4 Moore, 3957; *Isabella Thompson*, 3 Wallace, 155, 3 Moore, 3159; The *Pearl*, 5 Wallace, 574, 3 Moore, 3159; The *Adela*, 6 Wallace, 266, 3 Moore, 3159.

and brought to discussion, because the adverse judgment of the court is the foundation of the action taken.<sup>1</sup>

The difference between the two methods of procedure is a difference of form, not of substance. The question of form is, shall the judgment be presented or shall merely the question be presented? Questions of form are, in legal matters, of great importance, but we should not overlook the fact that we have subordinated the Supreme Court in times past to an international commission, and if we have done so in the past we may do so in the future. It would seem that the submission of the judgment to an International Tribunal would be a much more intelligent and a much more satisfactory solution; because instead of being presented to a commission constituted for a particular occasion, the questions or judgments would be adjudged by an impartial court permanently constituted, composed of trained lawyers, accustomed to hear evidence and to weigh it carefully. It may be, I do not venture a positive opinion, that if the decisions of the Supreme Court or the questions involved in the discussions thereof had been submitted to a tribunal composed of jurists permanently in session, instead of a temporary commission, some of them might not have been questioned or reversed, for reversed they were in the popular, though not in the judicial sense of the term.

The importance and interest of the subject require a more technical treatment of the difficulty based upon the fact that the Supreme Court is the ultimate court in the United States from which an appeal may not be taken. It may be admitted that an appeal would not lie from the Supreme Court to another court in the United States, for the judicial power of the United States is vested in one Supreme Court. A diplomatic court established in a foreign country is not a court of the

<sup>1</sup> There is no claim until the courts have decided. That decision, then, is not only not final, but on the contrary is the beginning, the very cornerstone of the international controversy.—Per Davis, J., in *Gray, Admr. v. United States*, 21 Court of Claims, 340, 401–402.



United States in the sense of the Constitution, any more than a mixed commission is a court of the United States.<sup>1</sup> In the next place, the judicial power of the United States is subject to definition and limitation, because the courts of the country can only be invested with the power possessed by the United States. If prize law be international law, the United States may provide a court for its administration and interpretation, but its decisions cannot make an international law for the nations, and their subjects not residing or domiciled in the United States are not bound to submit to its jurisdiction. Jurisdiction is not conferred by seizure, and following property unlawfully taken cannot be said to be submission to jurisdiction. The question, therefore, is as to the extent of the judicial power of the United States in the matter of prize.

If international law is in its entirety an integral and component part of the municipal law of the United States<sup>2</sup> and if the law of prize and the jurisdiction of prize courts are not only recognized by but derived from the law of nations, it follows that a recognition of international law by the Constitution without express or implied limitation is an adoption of the system of international law at the moment of its adoption, and if it appear, as is the case, that the decision of a prize court affecting neutral rights is only valid and final in so far as consistent with and based upon international law, and if it appear further that a judgment inconsistent with the law of nations, while conclusive between individuals is not final so far as the neutral nation is concerned, but subject to protest and appeal through diplomatic channels, it would seem to follow that the jurisdiction vested in the federal courts "concerning captures on land and water" by act of Congress, though final in respect to American citizens and aliens domiciled within the United

<sup>1</sup> In re Ross, 140 U. S., 453 (1890).

<sup>2</sup> International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.—The Paquette Habana, 175 U. S. 677, 700 (1899).

States, is neither final nor conclusive in regard to neutral nations.<sup>1</sup>

In vesting the judicial power in "one Supreme Court and in such inferior courts as the Congress may from time to time establish," it is to be presumed that the Constitution granted to the one Supreme Court and inferior courts established by Congress the jurisdiction in matters of international law possessed by the United States as a member of the family of nations, and that the Constitution and acts of Congress made in pursuance of the Constitution are to be interpreted in the light of the law of nations as recognized by the express wording of the Constitution. As, therefore, the law of nations did not recognize the decision of a municipal prize court in matters of neutral rights as final if in contravention of the principle of international law, it would seem to follow that the grant of jurisdiction to the one Supreme Court and inferior courts established by Congress was subject to the right of appeal recognized by the laws of nations as appertaining as of right to a neutral

<sup>1</sup> The defendants say, further, the condemnation can not be illegal because made by a prize court having jurisdiction, and the decisions of such courts are final and binding. This proposition is, of course, admitted so far as the *res* is concerned; the decision of the court, as to that, is undoubtedly final, and vests good title in the purchaser at the sale; not so as to the diplomatic claim, for that claim has its very foundation in the judicial decision, and its validity depends upon the justice of the court's proceedings and conclusion. It is an elementary doctrine of diplomacy that the citizen must exhaust his remedy in the local courts before he can fall back upon his Government for diplomatic redress; he must then present such a case as will authorize that Government to urge that there has been a failure of justice. The diplomatic claim, therefore, is based not more upon the original wrong upon which the court decided than upon the action and conclusion of the court itself, and, diplomatically speaking, there is no claim until the courts have decided. That decision, then, is not only not final, but on the contrary is the beginning, the very corner-stone, of the international controversy.—Per Davis, J., in *Gray, Admr. v. United States*, 21 Court of Claims, 340, 402.

Condemnation of prize courts are final in actions between individuals, and as to vessels condemned, giving purchasers a good title, but do not bind foreign nations, nor bind claims valid by international law.—*Cushing v. United States*, 22 Court of Claims. 1.

nation.<sup>1</sup> In other words, the judicial power of the United States, unlimited as far as citizens and property of citizens of the United States are concerned, is limited in the matter of neutral rights involved in the adjudication of prize by the law of nations. The right of protest and appeal through diplomatic channels is not excluded by the constitutional and congressional grant, however final in terms. In the absence of a Court of Appeal, common to the United States and the neutral, the controversy, international in its origin and nature, is subject to diplomatic adjustment by the contending nations, which may settle it directly by informal agreement or create by treaty a temporary or permanent tribunal for its judicial settlement. To this tribunal the question may be submitted, or, as best evidence of the controversy, the judgment of the supreme or inferior courts—for the settlement of the controversy between the nations is a diplomatic not a judicial question, and any evidence be it the original statement of the facts of the case or the judgment of a court of justice may be considered. As the treaty-making power exists for the purpose of regulating international intercourse—for the States of the Union are expressly forbidden to enter into relations with foreign States—and, as the claim of a neutral for violation of neutral rights is an international controversy, the establishment of an international court of prize for the judicial settlement of such controversies would seem to be an appropriate and commendable exercise of the treaty-making power. Whether our government cares to ratify the convention concerning the Prize Court would seem to be a matter of expediency, not of power. The treaty, however, would not be self-executory and Congress would have to pass appropriate legislation; but as Congress pos-

<sup>1</sup> The principle that the decisions of prize courts are not internationally conclusive as to the doctrines applied, and that a claimant injured by a wrongful decision may seek indemnity through the action of his Government, is no longer open to question. The right to indemnity in such cases was demonstrated in the remarkable opinion delivered by William Pinkney [Moore's *Int. Arbitrations*, Vol. III., p. 3180] as one of the commissioners under Article VII of the Jay Treaty, under which large amounts were paid by the British Government to citizens of the United States as

sesses the express constitutional power to "make rules concerning captures on land and water," no difficulty could arise on this head provided the expediency and constitutionality of the proposed court be beyond doubt. I admit, however, the gravity of the question, and while I hope that the convention will be ratified by our Senate, I cannot express a confident opinion. I can merely say that the spirit in the point of approach seems to be to ratify in as large a measure as possible the conventions negotiated at The Hague. As to the expediency or advisability of ratifying the special convention, the duly constituted authority, namely, the treaty-making power, must judge.

Should, however, the Senate be unwilling to permit an appeal from the District or Supreme Court to the International Court at The Hague, it is possible to secure by diplomatic agreement, without the modification of the text of the Convention, an additional article or protocol to be embraced in the ratification of the Convention by which each Signatory of the Convention of October 18, 1907, shall possess the option, in accordance with local legislation, either to submit the general question of the rightfulness of any capture to the determination of the International Prize Court, or to permit an appeal from the judgment of a National Court in a specific case direct to the International Court of Prize, as contemplated by the Convention of October 18, 1907. As formulated by our Secretary of State this article would be as follows:

indemnity for captures and condemnations under orders in council violative of the rights of neutral trade. Similar indemnities were obtained from France for wrongful captures and condemnations during the Napoleonic wars, as well as from Spain, Naples and Denmark. In the case of Denmark, the question of the international finality of prize sentences gave rise to a long discussion, which was conducted on the part of the United States by Henry Wheaton, as Minister to Denmark. Indemnities were also obtained by British subjects from the United States in certain prize cases under Article XII of the Treaty of Washington of May 8, 1871.—Moore's Int. Law Digest, Vol. VII, pp. 651-652.

For a long and careful argument that neither rights *in rem* nor *in personam* should be acquired by an illegal prize decision, see De Lapradelle et Politis: Recueil des Arbitrages Internationaux, Vol. I, pp. 87-99.



Any Signatory of the Convention for the establishment of an International Court of Prize, signed at The Hague on October 18, 1907, may provide in the act of ratification thereof, that, in lieu of subjecting the judgments of the courts of such Signatory Powers to review upon appeal by the International Court of Prize, any prize case to which such Signatory is a party shall be subject to examination *de novo* upon the question of the captor's liability for an alleged illegal capture, and, in the event that the International Court of Prize finds liability upon such examination *de novo*, it shall determine and assess the damages to be paid by the country of the captor to the injured party by reason of the illegal capture.<sup>1</sup>

Each nation would thus possess the option of submitting the judgment of its courts to the International Court at The Hague or of submitting the question of liability instead of the judgment for reexamination. Either method would obtain a final decision of the question involved by a permanent and impartial court composed of competent and impartial jurists. The difference would be one of form not of substance, but the withdrawal of a national judgment from examination and reversal seems eminently calculated to remove the objections made to the establishment of the court.

The question, then, of the operation of the court as a Court of Appeal may be considered as sufficiently discussed for our present purposes.

### 3. PARTIES TO A CASE BEFORE THE INTERNATIONAL PRIZE COURT

The question arises, what subjects may be brought before the court, and what persons or suitors may present them to the court? Article 3 says in substance: The appellant may claim that the Municipal Court was mistaken in fact, in which event the case is tried anew, or in law, in which eventuality the case is reargued upon the facts as found by the trial court. The jurisdiction of the proposed court is thus coëxtensive with the error complained of.

<sup>1</sup> For action of the Naval Conference on this point, see p. 510, post scriptum, *infra*.

As the court is primarily created to safeguard the rights of neutrals, it is natural that they should appear before it, either to claim property wrongfully seized and condemned, or to seek redress for an injury inflicted upon them contrary to the law of nations. The causes of appeal are as many and varied as the illegal actions of the belligerent captors.

The enemy is, however, permitted to appear before the court; but his right, unlike that of the neutral, is confined to certain clearly defined and specifically enumerated cases, because the action of belligerent against belligerent is no more subject to neutral jurisdiction than the propriety of neutral conduct to the whim and pleasure of a belligerent. The resort of the belligerent should be limited to cases in which neutral interests are involved or in which an existing convention between the belligerents, that is to say, an international obligation, is violated, or a legal disposition of the belligerent is improperly interpreted. An examination of the provisions of Article 3 shows that the right of the belligerent is so defined and restricted. For example, if enemy property upon a neutral vessel be seized, the Declaration of Paris is violated. The neutral can resort to the court because of the injury to his neutral right, but the enemy owner may also appeal to the court and its judgment will do justice to the neutral and to the enemy claimant. A double right of suit is a double guarantee.

In the next place, an enemy vessel may be captured in neutral waters. Here, again, a twofold right of action accrues, for the neutral may demand, through diplomatic channels, the return of the property in accordance with the provisions of Article 3 of the Convention Concerning Neutral Powers in Naval War, or the neutral may prefer to allow the court of the belligerent to pass upon the capture, and to prosecute an appeal before the International Court at The Hague. Small Powers find it difficult to obtain a hearing in the Foreign Offices, but courts of justice pay no respect to the question of worldly rank and position.

A case in the Supreme Court of the United States admirably explains the rights and duties of neutral and belligerent in such

a case. A Confederate cruiser named the *Florida* was captured in the territorial waters of Brazil during the Civil War. The right and duty of the neutral were thus stated:

The Brazilian Government was justified by the law of nations in demanding the return of the captured vessel and proper redress otherwise. It was due to its own character, and to the neutral position it had assumed between the belligerents in the war then in progress, to take prompt and vigorous measures in the case, as was done. The commander was condemned by the law of nations, public policy, and the ethics involved in his conduct.<sup>1</sup>

As between belligerents, the capture is valid.

Neither a belligerent owner nor an individual enemy owner can be heard to complain. But the neutral sovereign whose territory has been violated may interpose and demand reparation, and is entitled to have the captured property restored.

The court proceeds to state that

the title to captured property always vests primarily in the government of the captors. The rights of individuals, where such rights exist, are the results of local law or regulations. Here, the capture was promptly disavowed by the United States. They, therefore, never had any title.<sup>2</sup>

The question thus affects the neutral although the property of the enemy is involved. It is to be presumed that the belligerent government will disavow the act, either through its Foreign Office, or by decision of court. If this should not be so, then an appeal should lie to the International Court. Had the Supreme Court decreed the *Florida* legal prize, Brazil could have had recourse to The Hague Court. Article 4 of the Convention precludes the belligerent from bringing suit in a case of this kind, which provision is in strict accord with the law of our Supreme Court.

Finally, the court is open to the belligerent, in case "the seizure has been effected in violation either of the provisions of a Convention in force between the belligerent Powers, or of

<sup>1</sup> *The Florida*, 101 U. S. 37, (1879).

<sup>2</sup> *Ibid.*

an enactment issued by the belligerent captor." In the case of a convention the resort is natural, because "a convention between the belligerents" is an international act and properly subject to international construction and interpretation. The propriety of the latter clause is not so apparent, but not less real, because a belligerent has a right to a proper construction of a legal enactment of its enemy. A forced and unjust interpretation is a violation of justice which should be corrected in a court of law. The captor's court will give no redress. The International Court will. The mere fact of an appeal in such a case is a guarantee for a careful and correct decision. The mere right of appeal may probably render the appeal unnecessary.

Having stated in Article 3 the judgments from which an appeal may be taken, the Convention specifies in Article 4 the parties appellant.

#### ARTICLE 4

An appeal may be brought—

1. By a neutral Power, if the judgment of the National Tribunals injuriously affects its property or the property of its nationals (Article 3, 1), or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that Power (Article 3, 2, b);

2. By a neutral individual, if the judgment of the National Court injuriously affects his property (Article 3, 1.), subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place;

3. By an individual subject or citizen of an enemy Power, if the judgment of the National Court injuriously affects his property in the cases referred to in Article 3 (2), except that mentioned in paragraph b. .

The provisions of the first paragraph are self-evident and require neither explanation nor comment. It may be asked, why should the neutral individual be given a right to appeal? International law does not know individuals; international law deals with sovereign States. Why then should the individual appear as a suitor before an international court? There are several reasons. The individual suitor is the one who has



suffered. It may be that his country is unwilling to espouse his cause from a belief that it is properly decided, or it may be that he is a citizen or subject of a small country which may not wish to offend the belligerent by appealing. But the individual smarting under the loss of his property may appeal, and his appearance does not in any sense of the word render his country liable to ill treatment at the hand of the strong and powerful belligerent. Again, the Foreign Office may not care to be bothered with and pass upon a case that may properly go before an International Court. In this way the provision will be a great relief. But it may be that the case is so important, and the principle involved so far-reaching and fundamental that the neutral may wish to appear for the individual claimant, or for these very reasons it may decide that an appeal be improper, because the relief sought is one which the neutral as a belligerent would not consider for a moment. The matter is thus one affecting the neutral: it is for the neutral nation to decide, and the convention wisely and properly considers it one of national, not of international regulation.

As the wrong creates the right, it naturally follows that successors in interest to neutral or belligerent acquire the right of appeal to the court possessed by their predecessors. This appears from Article 5, the text of which follows:

An appeal may also be brought on the same conditions as in the preceding article, by persons belonging either to neutral States or to the enemy, deriving their rights from and entitled to represent an individual qualified to appeal, and who have taken part in the proceedings before the National Court. Persons so entitled may appeal separately to the extent of their interest.

The same rule applies in the case of persons belonging either to neutral States or to the enemy who derive their rights from and are entitled to represent a neutral Power whose property was the subject of the decision.

#### 4. THE LAW TO BE ADMINISTERED BY THE INTERNATIONAL PRIZE COURT

The question next arises, what law is the court to administer? The answer is far from easy and on it hangs the fate of

the court. If international law were codified, the code should be administered. Unfortunately this is not the case. If a principle of international law is universally recognized, the court would administer it, but there are many disputed points in international law and a uniform practice cannot be said to exist. Of the conflicting views, which is the court to take? In the absence of a general agreement, the court must determine the law applicable to the case, else it cannot reach a judgment. To allow the court to resolve the conflict is to invest it with legislative as well as judicial functions. The law must either be codified in advance, which has not been done, or it may be determined by special treaty between various Powers which will thus prescribe the law to be administered by the court in a case affecting these countries, or, otherwise, the court is limited to the administration of universally accepted law, a great gain to neutrals, but it would be forced to declare itself incompetent whenever the litigants opposed the clashing and irreconcilable principles of their national theory and practice.

To take a few familiar illustrations in order to present the difficulty in concrete form. What is contraband? What subjects are properly included in absolute or conditional contraband? What is blockade? When does it begin, when does it end, and when may a vessel be captured for attempting to break the blockade? Does it render itself liable to capture the moment it leaves neutral waters destined to the blockaded port, or when it actually, that is physically, attempts to enter the port? Does international law acknowledge the doctrine of continuous voyages in the matter of contraband? Is the doctrine applicable to blockade? These questions are answered one way by Anglo-American jurisprudence, and in another and irreconcilable way by many of the Continental nations of Europe. Which theory and practice shall the court prefer and apply?

The Conference attempted, without success, as will appear later, to codify the law of contraband and blockade, and it is a grave question whether the various nations parties to the Con-

vention will willingly submit to the decision of the tribunal when the law is not known, or when it cannot reasonably be predicted in advance. My own individual opinion, if I may dare to venture one, is this: the neutral wishes certainty rather than the triumph of any one system of law. It is uncertainty that worries him and interferes with his ventures. If the court, by adopting either principle, whether it be the Anglo-American or the Continental, renders certain that which was uncertain before, the interests of the neutral are safeguarded because he can conform his actions to a definite requirement of the law. Therefore, even if the Conference was unable to codify the law, the court could by consent of the nations reach a conclusion, as in the case of the common law of England which has grown by judicial decisions. The common law of nations would be given certainty and precision by the operation of the International Court. The question, however, is one of great gravity and fundamental importance. It must be met and solved, if the Prize Court is to enter into operation and confer upon neutral and belligerent the benefits predicted from its impartial and acceptable administration of justice.

The Convention deals in Article 7 with the law to be administered:

#### ARTICLE 7

If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the court is governed by the provisions of the said treaty.

In the absence of such provisions, the court shall apply the rules of international law. If no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity.

The above provisions apply equally to questions relating to the order and mode of proof.

If, in accordance with Article 3, 2, *c*, the ground of appeal is the violation of an enactment issued by the belligerent captor, the court will enforce the enactment.

The court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is of opinion that the consequences of complying therewith are unjust and inequitable.

It is a familiar maxim that *contemporanea expositio est optima et fortissima in lege*. Fortunately, contemporary exposition exists in this case in the beautiful and luminous report on the court presented to the Conference by Professor Louis Renault, and as his interpretation of this article was accepted by the Conference as its official interpretation, I quote in full his analysis:

What rules of law will the new Prize Court apply?

This is a question of the greatest importance, the delicacy and gravity of which can not be overlooked. It has often claimed the attention of those who have thought of the establishment of an international jurisdiction on the subject we are considering.

If the laws of maritime warfare were codified, it would be easy to say that the International Prize Court, the same as the national courts, should apply international law. It would be a regular function of the international court to revise the decisions of the national courts which had wrongly applied or interpreted the international law. The international courts and the national courts would decide in accordance with the same rules, which it would be supposed ought merely to be interpreted more authoritatively and impartially by the former courts than by the latter. But this is far from being the case. On many points, and some of them very important ones, the laws on maritime warfare are still uncertain, and each nation formulates them according to its ideas and interests. In spite of the efforts made at the present Conference to diminish these uncertainties, one can not help realizing that many will continue to exist. A serious difficulty at once arises here.

It goes without saying that where there are rules established by treaty, whether they are general or are at least common to the nations concerned in the capture (the captor nation and the nation to which the vessel or cargo seized belongs), the International Court will have to conform to these rules. Even in the absence of a formal treaty, there may be a recognized customary rule which passes as a tacit expression of the will of the nations. But what will happen if the positive law, written or customary, is silent? There appears to be no doubt that the solution dictated by the strict principles of legal reasoning should prevail. Wherever the positive law has not expressed itself, each belligerent has a right to make his own regulations, and it can not be said that they are contrary to a law which does not exist. In this case, how could the decision of a national Prize Court be revised when it has merely applied in a regular manner the law of its country, which law is not contrary to any



principle of international law? The conclusions would therefore be that in default of an international rule firmly established, the International Court shall apply the law of the captor.

Of course it will be easy to offer the objection that in this manner there would be a very changeable law, often very arbitrary and even conflicting, certain belligerents abusing the latitude left them by the positive law. This would be a reason for hastening the codification of the latter in order to remove the deficiencies and the uncertainties which are complained of and which bring about the difficult situation which has just been pointed out.

However, after mature reflection, we believe that we ought to propose to you a solution, bold to be sure, but calculated considerably to improve the practice of international law. "If generally recognized rules do not exist, the court shall decide *according to the general principles of justice and equity*." It is thus called upon to *create the law* and to take into account other principles than those to which the National Prize Court was required to conform, whose decision is assailed by the international court. We are confident that the judges chosen by the Powers will be equal to the task which is thus imposed upon them, and that they will perform it with moderation and firmness. They will interpret the rules of practice in accordance with justice without overthrowing them. A fear of their just decisions may mean the exercise of more wisdom by the belligerents and the national judges, may lead them to make a more serious and conscientious investigation, and prevent the adoption of regulations and the rendering of decisions which are too arbitrary. The judges of the International Court will not be obliged to render two decisions contrary to each other by applying successively to two neutral vessels seized under the same conditions different regulations established by the two belligerents. To sum up, the situation created for the new Prize Court will greatly resemble the condition which long existed in the courts of countries where the laws, chiefly customary, were still rudimentary. These courts made law at the same time that they applied it, and their decisions constituted *precedents*, which become an important source of the law. The most essential thing is to have judges who inspire perfect confidence. If, in order to have a complete set of international laws, we were to wait until we had judges to apply it, the event would be a prospective one which even the youngest of us could hardly expect to see. A scientific society, such as the Institute of International Law, was able, by devoting twelve years to the work, to prepare a set of international regulations on maritime prizes in which the organization and the procedure of the International Court have only a very limited scope. The community of civilized nations is more difficult to set on foot than an association

of juriconsults; it must be subject to other considerations or even other prejudices, the reconciliation of which is not so easy as that of legal opinions. Let us therefore agree that a court composed of eminent judges shall be entrusted with the task of supplying the deficiencies of positive law until the codification of international law regularly undertaken by the Governments shall simplify their task.

The ideas which have just been set forth will be applicable with regard to the order of admission of evidence as well as to the means which may be employed in gathering it. In most countries arbitrary rules exist regarding the order of admission of evidence. To use a technical expression, upon whom does the burden of proof rest? To be rational one would have to say that it is the captor's place to prove the legality of the seizure that is made. This is especially true in case of a violation of neutrality charged against a neutral vessel. Such a violation should not be presumed. And still the captured party is frequently required to prove the nullity of the capture, and consequently its illegality, so that in case of doubt it is the captured party (the plaintiff) who loses the suit. This is not equitable and will not be imposed upon the International Court.

What has just been said regarding the order of evidence also applies to the means of gathering it, regarding which more or less arbitrary rules exist. How can the nationality, ownership, and the domicile be proven? Is it only by means of the ship's papers, or also by means of documents produced elsewhere? We believe in allowing the court full power to decide.

Finally, in the same spirit of broad equity, the court is authorized not to take into account limitations of procedure prescribed by the laws of the belligerent captor, when it deems that the consequences thereof would be unreasonable. For instance, there may be provisions in the law which are too strict with regard to the period for making appeal or which enable a relinquishment of the claim to be too easily presumed, etc.

There is a case in which the International Court necessarily applies simply the law of the captor, namely, the case in which the appeal is founded on the fact that the national court has violated a legal provision enacted by the belligerent captor. This is one of the cases in which a subject of the enemy is allowed to appeal. (Article 3, No. 2a, at end.)

Article 7 which has thus been commented upon, is an obvious proof of the sentiment of justice which animates the authors of the draft, as well as of the confidence which they repose in the successful operation of the institution to be created.<sup>1</sup>

<sup>1</sup>La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, pp. 190-192.

The views of the Conference, as expressed by Professor Renault, have encountered criticism from various quarters, and of the many I select one because of the familiarity of its author with all matters of prize law. As far back as 1875, Professor John Westlake brought the matter of an International Prize Court before the Institute of International Law and prepared and presented a project to that learned and influential society.<sup>1</sup> His knowledge of the subject is wide and his interest in the success of the court keen. In his recently published volume on International Law he thus speaks of Article 7:

The terms in which Article 7 thus describes the law to be applied on the appeal require a careful examination. It is beyond question that relevant conventions must hold the first rank, and rules of international law which are generally recognized the second. But it is less clear in what sense all that is not concluded by one of those tests is referred to justice and equity. The school of "the Law of Nature and Nations," which succeeded to the school of Grotius and did not share that great man's reverence for facts, was ready to impose solutions of all international questions as the result of pure reason, and would have made short work of any dissents from its conclusions, even if supported by a considerable body of practice. It is true that this school is now much discredited, and in England especially when reasoning has to be resorted to on the affairs of the nations, the appeal is made to justice and the law of nature is rarely mentioned. Elsewhere, however, "the law of nature" or, "the primary law" are still mentioned often enough to prevent one's feeling quite sure whether the notions once connected with them may not survive to such an extent as to influence the judgment about what justice and equity demand.

The subject is one which so imperatively demands frankness that we will illustrate it by examples, and they shall not be taken from topics covered by the Declaration of Paris, the rules of which may well be treated as now generally recognized. Is the notice of blockade, to which a ship desiring to enter a blockaded port is entitled, to be measured by the British or French rules? Is conditional contraband to be allowed? If not, can coal and provisions ever be absolute contraband? Does the declaration of the commander of a neutral convoy exclude the right of search? These and many others are questions on which it cannot be said that any rules are generally recognized. By leaving them to justice and equity, is it meant that they are

<sup>1</sup> See *Annuaire of the Institute*, Vol. II, (1878), p. 114.

left quite open for the International Prize Court to deal with as if they had never been raised before they came before it, as writers belonging to the school of the Law of Nature and Nations would have done? Or is it meant that a wholly different class of considerations may be taken into account? The appeal will lie from a National Court bound by its sovereign's view of the law, and it is not just or equitable for a Court of Appeal to reverse a judgment which the court below was right in giving. The convention, if entered into, will not have been intended to transfer the jurisdiction from the national courts to the International Prize Court, but to afford a remedy for abuses in its exercise. Only in the case contemplated by Article 6, where there will have been laches on the part of the proper jurisdiction, can the International Prize Court act as one of first instance. In every other case it will be dealing with a national pronouncement which justice and equity will forbid its reversing when it was founded on a view of international rights seriously entertained by the State in question, and not ousted by stipulation or general recognition to the contrary.

M. Renault, in the report which he presented on behalf of the sub-committee which prepared the draft (Comité d' Examen de la Seconde Sous-Commission), fully admitted the strength of the latter view. "What," he said, "will happen if positive law, written or customary, is silent? The solution dictated by the strict principles of juridical reasoning does not appear doubtful. In default of an international rule firmly established, the international jurisdiction will apply the law of the captor. No doubt it is easy to object that we shall so have a very variable law, often very arbitrary and even such as to shock us, certain belligerents using to an excess the latitude left by positive law. That would be a reason for hastening the codification of the latter, in order to efface the gaps and uncertainties which are complained of, and which cause the difficult situation that has been pointed out." But he went on to say: "Nevertheless, after mature reflection, we think it our duty to propose to you a solution, bold without doubt, but of such a nature as seriously to ameliorate the practice of international law." Then he stated the formula adopted in Article 7, and proceeded: "The court is thus called on to make the law (*faire le droit*), and to take account of principles other than those to which the National Prize jurisdiction, of which the decision is attacked before the International Court, was subject. We are confident that the magistrates chosen by the powers will rise to the height of their mission, and will exercise it with moderation and firmness. They will point practice in the direction of justice without upsetting it. Let us then admit that a court composed of eminent magistrates shall be charged with supplying the insufficiencies



of positive law, until the codification of international law, regularly pursued by governments, comes to simplify its task."<sup>1</sup>

It is therefore certain that the learned reporter intended, in default of stipulation and general agreement, to invest the International Prize Court with the mission claimed by a Pufendorff, only trusting to its moderation in exercising it. There are no doubt minor points on which the court might usefully build up a practice, or decide in particular cases where it would be difficult to embody a practice in terms of any generality. For instance, after what happened during the South African War a claim to search for contraband at any distance from the ship's destination cannot be said to be generally recognized, and the court might be trusted to decide whether any particular search was too remote, while if a rule of any generality resulted from such decisions it might be thankfully accepted. But in the light of M. Renault's report it is certain that the adopted draft of 1907 would be interpreted to put in the power of the court those major points of which we have given examples, and on which the inveteracy of the differences is proved by the failure of the same conference to settle them. We cannot therefore advise the conclusion of a convention in the terms of that draft unless the law of the captor be put in the last place in Article 7, or at least unless Article 7 be fenced by a proviso that the judgment of a court of any State shall not be reversed because it gives effect to a view of international law seriously maintained by that State. Under such conditions an International Prize Court would still have great functions to perform, and would in our judgment be a valuable improvement on the present system.<sup>2</sup>

Professional opinion in Great Britain is opposed to Article 7 as it stands, and Great Britain has already invited a Conference of Maritime Powers to meet in London, December 4, 1908, in order to agree upon the law to be applied in the absence of a convention between the parties and of "a generally recognized rule."<sup>3</sup> If this be the only serious objection to the court,

<sup>1</sup> *Courrier de la Conférence*, No. 75, 10 September, 1907.

<sup>2</sup> Westlake's *International Law*, part II, pp. 293-296.

<sup>3</sup> The subjects upon which an agreement is considered indispensable by the British Government in order to enable the International Prize Court to perform the high services expected by its establishment are the following:

a. Contraband, including the circumstances under which particular articles can be considered as contraband; the penalties for their carriage; the immunity of a ship from search when under convoy; and the rules with

the omission of the paragraph for the present would enable the court to be established by the Contracting Powers. A subsequent conference could no doubt frame an acceptable compromise.

The next conference is to undertake "the preparation of regulations relative to the laws and customs of naval war" in accordance with a *vœu* by the recent Conference, and it is to be hoped that the laws and customs of naval war may be codified as successfully as the laws and customs of land warfare. In this case the court would have a complete code to administer. A few years are as nothing in the life of nations. Another conference will have met and concluded its labors before we are many years older,—before, it is to be hoped, a war shall have supplied the court with business.

regard to compensation where vessels have been seized but have been found in fact only to be carrying innocent cargo;

b. Blockade, including the questions as to the locality where seizure can be effected and the notice that is necessary before a ship can be seized;

c. The doctrine of continuous voyage in respect both of contraband and of blockade;

d. The legality of the destruction of neutral vessels prior to their condemnation by a Prize Court;

e. The rules as to neutral ships or persons rendering "unneutral service" ("*assistance hostile*");

f. The legality of the conversion of a merchant vessel into a warship on the high seas.

g. The rules as to the transfer of merchant vessels from a belligerent to a neutral flag during or in contemplation of hostilities;

h. The question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property is enemy property.

The importance attached by the British Government to an agreement upon these various subjects enumerated in the program is evidenced by the fact that it is stated in the British note that "it would be difficult, if not impossible, for His Majesty's Government to carry the legislation necessary to give effect to the convention unless they could assure both Houses of the British Parliament that some more definite understanding had been reached as to the rules by which the new tribunal should be governed."

## 5. THE EFFECT OF A JUDGMENT OF THE INTERNATIONAL PRIZE COURT

But supposing the difficulties raised by the law to be administered have been resolved, the question of the effect of the judgment of the International Court upon the National Court must be considered. Here again the question is one of gravity and of no little difficulty. The difference between arbitration and a Court of Appeal is apparent and real. The award of a mixed commission may be inconsistent with a national judgment, but it does not reverse it. The mixed commission and the National Court are for purposes of the case coördinate and equal jurisdictions, and the decision of either has, technically speaking, no direct influence upon the other. The idea of reversal presupposes the relation of superior and inferior. The decision of the law court is affirmed or reversed on appeal. The Court at The Hague is a Court of Appeal in prize cases and national instances are but successive links in a chain of jurisdictions culminating in The Hague. When the mixed commission constituted in virtue of the Treaty of Washington of May 8, 1871, allowed certain claims presented to it, which claims had been passed upon by the District and Supreme Courts of the United States and adjudged adversely to the claimants, the national judgment was final as far as the judicial power and judiciary of the United States were concerned. The judgment might or might not be executed, and it was proper for the United States as a sovereign State to stay or to enforce execution. Congress could appropriate the amount involved in the judgment and present it to the claimant without affecting the validity of the judgment, or Congress might make the appropriation and distribution of the sum involved depend upon an examination of the claim by a mixed commission and the finding of facts sufficient to justify payment. The judgment of the court would be untouched or unreversed by this action. The commission would necessarily consider the judgment, because it is the denial of justice evidenced by the judgment which gives rise to the claim. The judgment

of the court might be the subject of discussion and criticism, and the commission might content itself with adopting a dissenting judgment of the Supreme Court as the fullest and most adequate expression of its views. For example, in the well known case of the *Circassian* (2 Wallace 135), decided by the Supreme Court in 1864, holding that a blockade is not raised by land occupation of the port, the British claimants presented the dissenting opinion of Mr. Justice Nelson as a correct exposition of the law applicable to the case. Not merely the judgment of the court but the opinions of the judges were involved. The Commissioner for the United States likewise considered the judgment of the court and the opinions of the judges, and he expressly stated that the condemnation of the *Circassian* was correct.<sup>1</sup>

The Commission (the American Commissioner dissenting) made awards in favor of all the claimants, in the case of the *Circassian* and the awards, inconsistent with a solemn decision of the Supreme Court of the United States, were paid in full. We may maintain, if we please, that the judgment of the court was not reversed and technically this contention is correct; but the fact remains that the United States permitted a judgment of the Supreme Court to be considered, examined and discredited by an international commission. The question involved may have been finally settled from a national standpoint, but it was not finally settled from an international point of view. *Qui vult decipi, decipiatur*.

Technically, however, the judgment of the Supreme Court in the case of the *Circassian* was legally unreversed and as such would seem to be binding upon the Supreme Court. Such was the opinion of that august tribunal in the case of the *Adula* (176 U. S. 361) arising out of the recent Spanish-American War, for it followed by a majority of five to four the judgment in the *Circassian* that occupation of a blockaded port does not raise the blockade. The award of a mixed commission, therefore, deals simply with the case presented; it does not in contem-

<sup>1</sup> Moore's International Arbitrations, Vol. IV, p. 3923.



plation of law overrule a decision of the National Court, which stands until disregarded and overruled by the National Court in question.

The Court at The Hague is to be a Court of Appeal, and, from the nature of things, a Court of Appeal as a superior institution reverses as of course the decision of a tribunal from which the appeal is lodged. The National Court is required to transmit the record of the case to the International Bureau at The Hague (Article 29) and the International Court "takes into consideration in arriving at its decision all the facts, evidence and oral statements" (Article 42) and may "either at the request of one of the parties, or on their own initiative," order supplementary evidence to be taken (Article 35). The proposed court is, indeed, as stated in the British project, a High Court of Appeal. When the sentence is reached

the Court transmits to the National Prize Court the record of the case, together with copies of the various decisions arrived at and of the minutes of the proceedings. (Article 45.)

What is the effect of the judgment upon the National Court? Article 8 speaks in no uncertain terms:

If the court pronounces the capture of the vessel or cargo to be valid, they shall be disposed of in accordance with the laws of the belligerent captor.

If it pronounces the capture to be null, the court shall order restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo has been sold or destroyed, the court shall determine the compensation to be given to the owner on this account.

If the National Court pronounced the capture to be null, the court can only be asked to decide as to the damages.

I quote again the official interpretation of this article from the report of Professor Renault:

What decisions can the court give?

Three hypotheses may be foreseen.

The court confirms the decision of the National Court and, consequently, declares the capture of the vessel or cargo to be valid. The vessel or cargo is then disposed of according to the laws of the belligerent captor, which are the only ones applicable in this case.

The court decides that the capture is null and void, and, consequently, orders the restitution of the vessel or cargo which are found to have been unduly seized. It may happen that such restitution will be sufficient to satisfy the demands of justice. It may also happen that it will not be sufficient because an unjust injury has been caused and must be repaired. This will depend on the circumstances, which may be very varied. The captain of the seized vessel may have been free from any reproach, or he may have given rise to suspicions through his own fault, and it matters not if he justifies his conduct in the end, he will have to bear the injurious consequences of his act. The court will judge. If the vessel or the cargo has been sold or destroyed, as may happen in many cases, especially if the final decision of the National Court has been executed without regard to the nonsuspensory appeal, as was said above, the court determines the indemnity to be granted on this score to the owner or his assigns.

The same award of the court may contain decisions of both kinds, validating, for instance, the capture of the vessel and annulling the seizure of the cargo in whole or in part.

Finally, one may suppose that the capture had been pronounced null and void by the National Court. In this case one can only imagine an appeal being made because the party obtaining this award had asked damages which were not allowed him or which were allowed him only to an extent deemed by him insufficient. He asks the court to render a decision allowing him damages, and the court is competent only to do this. A captor who has lost his suit before the national courts of his nation can obviously not appeal to the international jurisdiction.<sup>1</sup>

In a word, the Court at The Hague is a Court of Appeal to which the national judgment is to be submitted in order that the case may be examined *de novo* upon its merits. The facts of the case are to be reconsidered and supplementary evidence taken, the law is to be argued, debated, and applied, and the decision reached upon appeal is to be transmitted to the National Court with instructions to proceed in accordance with the international decision. If the case is considered *de novo*, it is in reality a retrial of the case, not an appeal in the strict and technical sense of the word. It is a resubmission of the case, as in a proceeding before a mixed commission, with the

<sup>1</sup> Report of M. Renault to the Conference, La Deuxième Conférence Internationale de la Paix, 1907 Actes et Documents, Vol. I, pp. 192-193.

original or certified copy of the record of the National Court as evidence both of the law and of the facts. The convention speaks merely of the record, but it is clearly within the power of the National Court to submit a certified copy of the record which has thus the same effect as the original.

If the United States prefers to submit the judgment of the Supreme Court to the International Court, Congress may, by apt legislation, permit the appeal from the District Court, in accordance with Article 6 which provides that

The municipal law of the belligerent captor shall decide whether the case may be brought before the International Court after judgment has been given in first instance or only after an appeal.

As Congress has deprived the Circuit Court of jurisdiction in prize cases, it may provide that the case be transmitted to the International Court without involving the dignity of the Supreme Court, and thus lessen the volume of business under the weight of which this august tribunal staggers. Such action would be especially appropriate if prize law is international law as previously pointed out.

The judgment of the International Court is not self-executing, and although

the Contracting Powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay (Article 9),

the convention prescribes no means of enforcing the international judgment. It is, therefore, no subtlety to say, when a decision is reached by international authorities and our country has agreed in advance to execute the decision, that the decision so rendered is executed in conformity with the laws of the United States, and is not the intervention of a foreign jurisdiction or of a foreign sheriff or marshal. I do not disguise the gravity of the situation, but I hope the convention may be ratified, because it marks a great progress.

## 6. THE APPOINTMENT OF JUDGES AND THE ORGANIZATION OF THE COURT

Having thus considered the origin, nature, the purpose and jurisdiction of the court, it is necessary to discuss briefly its composition, that is to say, the method of appointing the judges and thus constituting the court.

The court is to consist of judges, trained in international law and in maritime law, to be chosen from those who are capable of admission to the highest magistracy of their respective countries, or to be composed of teachers of law in the higher institutions of the various countries (Article 10.) This latter provision was put in especially, if I may betray a little confidence, in order to secure the services of such men as Renault, de Martens, and Professor Lammasch, who occupy chairs in the leading universities of their respective countries. Admitting that competent persons are to be chosen, how are they to be chosen? The Conference, after much doubt and hesitancy, and amid great opposition, finally reached a conclusion. It was felt impossible to have a court composed of a judge for each State, for that would be a judicial assembly, not a court. The moment it was proposed to reduce the number, the country that felt itself excluded maintained the legal equality of the State and insisted that any provision which would exclude it would be an attack upon this equality. For example, the first delegate from Santo Domingo said to me personally:

I will not be a party to any convention which does not recognize the same right in my country to a seat in the court as is recognized to Great Britain; not merely a right, but the exercise of that right.

The majority fortunately took note of historical facts as they exist, rather than excessive legal theory which is largely a fiction, with the result that the court is composed of fifteen judges, and, of these fifteen, eight are to be selected from the following countries: Germany, United States, Austria-Hungary, France, Great Britain, Italy, Japan and Russia. The other judges



composing the fifteen are to be selected at the same time as these others for the full period of six years, but they are to be called upon to serve for a lesser period, some four years, some two years, some one year, and some are only to be called into the court when their country has a case before it. We may consider this provision as unsatisfactory. It is; it is arbitrary. But it was the best that could be devised in order to bring about substantial unanimity. The large Powers would not be parties to the court or consent to its establishment if they were not permanently represented and thus form a permanent nucleus.<sup>1</sup> The small Powers, after great argument and with no little misgiving, finally consented to accept the classification. It is a classification based upon the principle of population, of industry, of commerce, and of merchant marine, and if the convention be ratified there will be a body of fifteen trained jurists, nine of whom will form a quorum, and eight of these nine will represent the great maritime nations of the world. We thus have the unwonted spectacle of belligerents submitting the validity of their actions affecting neutral Powers and property to a court composed of fifteen judges, thirteen of whom are neutrals, on the supposition that two of the contracting parties are at war. Should it happen that a state at war is not, according to the composition of the court, represented, this State has the right to appoint a judge for the case, so that no distinction is made in this regard between large or small Powers. In order that the organization of the court may be made clear, I quote without comment the material articles of the convention.

#### ARTICLE 16

If a belligerent Power has, according to the rota, no Judge sitting in the court, it may ask that the Judge appointed by it should take part in the settlement of all cases arising from the war. Lots shall then be drawn as to which of the Judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the Judge appointed by the other belligerent.

<sup>1</sup> For the composition of the court during the life of the convention, see Vol. II, pp. 505-506.

## ARTICLE 17

No Judge can sit who has been a party, in any way whatever, to the sentence pronounced by the national courts, or has taken part in the case as counsel or advocate for one of the parties.

No Judge or Deputy Judge can, during his tenure of office, appear as agent or advocate before the International Prize Court, nor act for one of the parties in any capacity whatever.

## ARTICLE 18

The belligerent captor is entitled to appoint a naval officer of high rank to sit as Assessor, but with no voice in the decision. A neutral Power, which is a party to the proceedings or whose subject or citizen is a party, has the same right of appointment; if as the result of this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

## ARTICLE 19

The court elects its President and Vice-President by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot.

## ARTICLE 20

The Judges of the International Prize Court are entitled to traveling allowances in accordance with the regulations in force in their own country, and in addition receive, while the court is sitting or while they are carrying out duties conferred upon them by the court, a sum of 100 Netherland florins per diem.

These payments are included in the general expenses of the court dealt with in Article 47, and are paid through the International Bureau established by the Convention of the twenty-ninth July, 1899.

The Judges may not receive from their own Government or from that of any other Power any remuneration in their capacity of members of the court.

## ARTICLE 21

The seat of the International Prize Court is at The Hague and it cannot, except in the case of *force majeure*, be transferred elsewhere without the consent of the belligerents.

## ARTICLE 22

The Administrative Council fulfills, with regard to the International Prize Court, the same functions as to the Permanent Court of Arbitration, but only Representatives of Contracting Powers will be members of it.

## ARTICLE 23

The International Bureau acts as registry to the International Prize Court and must place its offices and staff at the disposal of the court. It has charge of the archives and carries out the administrative work.

The Secretary-General of the International Bureau acts as Registrar.

The necessary secretaries to assist the Registrar, translators and shorthand writers are appointed and sworn in by the court.

## ARTICLE 24

The court determines which language it will itself use and what languages may be used before it, but the official language of the national courts which have had cognizance of the case may always be used before the court.

## ARTICLE 25

Powers which are concerned in a case may appoint special agents to act as intermediaries between themselves and the court. They may also engage counsel or advocates to defend their rights and interests.

## ARTICLE 26

A private person concerned in a case will be represented before the court by an attorney, who must be either an advocate qualified to plead before a Court of Appeal or a High Court of one of the Contracting States, or a lawyer practicing before a similar court, or lastly, a professor of law at one of the higher teaching centers of those countries.

The judges are, therefore, to be trained in maritime law; they shall not have taken any part in the decision of the National Court; they receive compensation when actually engaged in the performance of their judicial duties; they are forbidden to receive any compensation as judges either from their own or from a foreign government. The court thus constituted is, in the highest sense of the word, a judicial tribunal.

The presence of naval offices caused much debate. The German project made the high naval officers members of the court, but, as Mr. Choate aptly remarked, it was the duty of the naval officers to supply cases, not to decide them.

And lastly, as to the equally important question, what element shall enter into the composition of the court, whether it be permanent or temporary. It is most earnestly contended on the part of several nations that that court should consist only of learned jurists and no other element should enter into its composition, and we are one of the nations who are strongly convinced of that view. A court is a court, and a jurist is a jurist, and in our judgment the introduction of any other element than jurists tends to detract to that extent from the true judicial character which the tribunal should possess. On the other hand it is claimed, with equal confidence and earnestness, that it should consist in part, at least, of admirals who are not jurists, and do not claim to be, but who are justly claimed to have special qualities and skill to contribute to the solution of maritime and prize questions. Now while we cannot consent to accept that method of constituting a court, is there not an approach to it which may satisfy, approximately at least, the claims of both contending parties? I think myself the importance of the claims of those who contend for the introduction of admirals or naval experts as a component part of the court is greatly overestimated. If, as Monsieur Kriege of the German delegation, concedes, the two admirals appointed by the contending belligerents should neutralize each other, it might be a useful and interesting contribution by belligerents to neutrality, but would it really do any good? If each admiral, sitting at either end of the court, is to neutralize or kill the other off, why have them at all? Will it not simply end in their mutual slaughter without adding any new life, strength or vigor to the court? Why put them up upon such an exalted bench for the mere purpose of shooting each other down?

And if, as Monsieur de Martens of the Russian delegation, has insisted, it is necessary to have the presence in the tribunal of experienced admirals or learned naval experts, without whose advice and concurrence the decisions of the court cannot be reached, is it absolutely necessary to give them seats upon the exalted bench itself and will not chairs placed a little lower satisfy all the necessities and reasonable demands of the occasion? May they not be present, not absolutely as judges to give the decision, but as advisers without whose full advice no decision can be rendered? No one would claim that they should be present as expert witnesses to be examined and cross-exam-



ined. But they would be in the highest degree useful as skilled experts with the same authority as the judges to examine and cross-examine the witnesses and to collate and arrange the proofs. Would it not also be entirely practicable to admit them to the consultations of the secret chamber of the judges and to provide that no decision should be rendered until they had been admitted to such consultations and fully maintained their views?<sup>1</sup>

The result of profound and illuminating discussion is a Permanent Court,—permanent in the sense that it does not need to be constituted for each case or war,—ready to meet at The Hague, and to decide impartially and under a sense of judicial responsibility any questions of maritime law properly submitted to it. This is, without possibility of contradiction, the greatest step hitherto taken for the protection of the legitimate interests of neutrals and of neutral property.

Without discussing further the details of the convention, which are of value for the present purpose only as they explain the nature of the proposed institution, I quote the opinion of the President in his recent message to Congress:

A further agreement of the first importance was that for the creation of an International Prize Court. The constitution, organization and procedure of such a tribunal were provided for in detail. Anyone who recalls the injustices under which this country suffered as a neutral power during the early part of the last century can not fail to see in this provision for an International Prize Court the great advance which the world is making towards the substitution of the rule of reason and justice in place of simple force. Not only will the international prize court be the means of protecting the interests of neutrals, but it is in itself a step towards the creation of the more general court for the hearing of international controversies to which reference has just been made. The organization and action of such a prize court can not fail to accustom the different countries to the submission of international questions to the decision of an international tribunal, and we may confidently expect the results of such submission to bring about a general agreement upon the enlargement of the practice.

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, First Commission, Second Sub-Commission, 3d Session, July 11, 1907.

## 7. THE AMERICAN FORERUNNER OF THE INTERNATIONAL PRIZE COURT

It may not be inappropriate to state, in conclusion, that the establishment of an International Court of Prize is but an unconscious imitation, as in the case of the Court of Arbitral Justice, of the example set by the United States, which found it necessary to establish a Supreme Court of Prize to settle the conflicts of decision in such matters arising out of the existence of prize courts in the thirteen original States.

The broad mind of Washington foresaw the necessity of a central authority in matters of prize, and in a letter to Congress, dated November 11, 1775, from his headquarters in Cambridge, he said:

Should not a court be established by authority of Congress, to take cognizance of prizes made by the Continental vessels? Whatever the mode is, which they are pleased to adopt, there is an absolute necessity of its being speedily determined on.<sup>1</sup>

Congress, on November 25, 1775, acted by recommending the several States to erect prize courts and vested an appeal in Congress.

That in all cases an appeal shall be allowed to the Congress, or such person or persons as they shall appoint for the trial of appeals, provided the appeal be demanded within five days after definitive sentence, and such appeal be lodged with the secretary of Congress within forty days afterwards, and provided the party appealing shall give security to prosecute the said appeal to effect, and in case of the death of the secretary during the recess of Congress, then the said appeal to be lodged in Congress within twenty days after the meeting thereof.<sup>2</sup>

On learning of this action, Washington wrote:

The resolves relative to captures made by Continental armed vessels only want a court established for trial to make them complete. This, I hope, will be soon done, as I have taken the liberty to urge it often to Congress.

<sup>1</sup> Writings of Washington, ed. Sparks, III, 154, 155; Essays in the Constitutional History of the United States, ed. by J. Franklin Jameson, p. 7.

<sup>2</sup> Jour. Cong., I, 184.

The Congress moved slowly, and it was not until January 15, 1780, that the court was established. The importance, if not the immediate necessity, of the subject was recognized, but it seemed proper to provide for the court in the Articles of Confederation. Article 9 dealt with the subject and was agreed upon in 1777, but the articles as a whole were not ratified until March 1781. Congress, therefore, established the court without waiting for the final approval of the Articles of Confederation, moved thereto by a famous controversy between Connecticut, Pennsylvania and the Federal authorities.

In September, 1778, Gideon Olmstead, of Connecticut, and three associates were captured by the British and carried to Jamaica, where they were put on board the sloop *Active*, bound for New York with a cargo of supplies, and forced to assist in the navigation of the vessel. They rose upon the master and crew, took possession of the sloop, and steered for Little Egg Harbor. When in sight of land they were forcibly taken by the armed brig *Convention* which belonged to Pennsylvania, and carried to Philadelphia, where the *Active* was libeled as prize. A claim was also made by the captain of a privateer cruising in concert with the *Convention*. The case was tried in the State Admiralty Court before Judge Ross and a jury, under an act which provided that the finding of facts by the jury should be final, without reëxamination or appeal. The Connecticut captors were awarded but a fourth of the prize, the residue being divided between the State of Pennsylvania and the officers and crew of the *Convention* and the privateer. An appeal was taken to Congress, and referred to the Standing Committee of Appeals, and, after a full argument, the action of the State Court was reversed. Judge Ross refused to recognize the authority of Congress, insisting that the verdict was conclusive, and, in defiance of a writ in the nature of an injunction, issued by the Congressional Committee, ordered the sloop and cargo to be sold and the proceeds to be brought into Court. Thereupon the Committee declared that they were unwilling to resort to any summary proceedings lest consequences might ensue dangerous to the peace of the United States, but firmly declined to hear any other appeals until their authority as a court of last resort should be so settled as to give full effect to their decrees. The matter was taken up by Congress and a spirited declaration entered upon its journals in support of its authority, based upon the argument that control by Appeal was necessary to secure a just and uniform execution of the law of nations, and that it would be an absurdity to trust such

matters to the accidental verdicts of juries in the State Courts. Conferences were held between Congressional and Legislative Committees with little effect, and so far as the rights of Olmstead were concerned, the decree in his favor remained a *brutum fulmen* until, many years afterwards he secured the favorable interposition of the Supreme Court of the United States.<sup>1</sup>

The Constitutional Convention of 1787 recognized the inefficiency of the Court of Arbitration for the settlement of controversies between the States "concerning boundary, jurisdiction or any cause whatsoever" and the Federal Court of appeals for Prize Cases, and established a Supreme Court in which State might sue State for causes which, if arising between sovereign and independent States, might result in war.

May we not hope that a Supreme Court of forty-six nations may do for the community of nations what the Supreme Court of the United States does and has done for forty-six States?

<sup>1</sup> Carson's Supreme Court of the United States, pp. 53-54. United States v. Judge Peters, 5 Cranch, 115 (1809).

POST SCRIPTUM. The Naval Conference at London adopted, on February 26, 1909, the following *vœu* based upon Mr. Root's proposal as printed on p. 483, *supra*.

The delegates of the Powers to the Naval Conference, taking into consideration the difficulties of a constitutional character which, as regards certain States, stand in the way of the ratification in its present form of the convention signed at The Hague on the eighteenth October, 1907, for the establishment of an International Prize Court, agree to point out to their respective Governments the advantages there would be in concluding an arrangement under which such Governments would at the time of the deposit of their ratifications have the right to append thereto a reservation to the effect that the right to have recourse to the International Prize Court in connection with the decisions of their national courts shall take the form of a direct action for indemnity; provided, however, that the effect of this reservation shall not be such as to affect the rights guaranteed by the said convention either to private parties or to their Governments, and that the terms of the reservation shall be made the subject of a subsequent understanding among the Powers signatories to the said convention.



## CHAPTER XI

### THE OPENING OF HOSTILITIES, THE LAWS AND CUSTOMS OF WAR ON LAND, THE RIGHTS AND DUTIES OF NEUTRAL POWERS AND PERSONS IN CASE OF WAR ON LAND

The original call of the First Conference laid stress upon the increasing burden imposed upon nations by the constant increase in military and naval armament, and, while it did not suggest disarmament, the circular expressed the hope that the Conference might be able to check the increase of armament, and by conventional agreement limit the army and navy for a period of years, forbid the employment in warfare of certain means and instrumentalities previously permitted or likely to be created by inventive genius, and universally introduced into armies and navies. The revised circular, while denouncing the increase of armament nevertheless laid stress upon the means whereby war might be prevented and thus enlarged the scope of the Conference. Public opinion eagerly seized upon the first circular and in many quarters the revised rescript was regarded as a retreat from the advanced position taken in the first call. But it cannot be said that this criticism is wholly correct, because by the second circular the Conference was still required to discuss the limitation of armaments, if not the question of disarmament, and, in addition, to consider the means whereby international conflicts might be settled by peaceful means. In other words, the purpose of the Conference was twofold, to devise if possible means whereby the increase of military charges and expenditure might be checked and warfare regulated, where it could not be abolished,

and on the other hand to provide simple and adequate machinery for the pacific settlement of international disputes. The success of the Conference in the second heading has already been considered; it remains to discuss the various proposals made and the conventions adopted for the regulation of land and naval warfare by the First and Second Conference. An examination of these various instruments shows that they are twelve in number including a signed declaration and that they fall naturally into three groups: 1, three conventions relating to land warfare; 2, eight conventions regulating naval warfare; 3, a signed declaration concerning aërial warfare, and certain recommendations of the conferences concerning land and naval warfare which will be mentioned in connection with the various conventions to which they relate. These conventions will be considered, with the single exception of the Prize Court, already discussed, in the order of the Final Act.

### 1. THE PROGRESS OF CODIFICATION

While opinion may differ as to the value of the conventions as a whole, there can be no doubt that they mark an era in the history of international law; for the nations of the world assembled in conference undertook seriously and consciously the codification of the laws and customs of war in order to replace confusion by precision, so that by defining the rights and duties of belligerents and neutrals, war shall not as heretofore sow the seeds of discord which may ripen into future wars. A distinguished writer on international law, Dr. Oppenheim, the present Whewell professor of international law at Cambridge, outlines in the following paragraphs the origin and development of the movement for codification which culminated in the First Conference:

The lack of precision which is natural to the majority of the rules of the Law of Nations on account of its slow and gradual growth has created a movement for its codification. The idea of a codification of the Law of Nations in its totality arose at the end of the eighteenth century. It was Bentham who first suggested such a codification. He did not, however, propose codification of the positive existing Law of Nations, but

thought of a utopian International Law which could be the basis of an everlasting peace between the civilized States.<sup>1</sup>

Another utopian project is due to the French Convention, which resolved in 1792 to create a Declaration of the Rights of Nations as a pendant to the Declaration of the Rights of Mankind of 1789. For this purpose the Abbé Grégoire was charged with the drafting of such a declaration. In 1795, Abbé Grégoire produced a draft of twenty-one articles, which, however, were rejected by the Convention, and the matter dropped.<sup>2</sup>

It was not before 1861 that a real attempt was made to show the possibility of a codification. This was done by an Austrian jurist, Alfons von Domin-Petruchévecz, who published in that year at Leipzig a *Précis d'un Code de Droit International*.

In 1862, the Russian Professor Katschenowsky brought an essay before the Juridical Society of London (Papers II, 1863), arguing the necessity of a codification of International Law.

In 1863, Professor Francis Lieber, of the Columbia College, New York, drafted the Laws of War in a body of rules which the United States published during the Civil War for the guidance of her army.

In 1868, Bluntschli, the celebrated Swiss interpreter of the Law of Nations, published *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*. This draft code has been translated into the French, Greek, Spanish and Russian languages, and the Chinese Government produced an official Chinese translation as a guide for Chinese officials.

In 1872, the great Italian politician and jurist, Mancini, raised his voice in favor of codification of the Law of Nations in his able essay, *Vocazione del nostro secolo per la riforma e codificazione del diritto delle genti*.

Likewise in 1872 appeared at New York, David Dudley Field's *Draft Outlines of an International Code*.

In 1873 the Institute of International Law was founded at Ghent in Belgium. This association of jurists of all nations meets periodically, and has produced a number of drafts concerning various parts of International Law, and in especial a *Draft Code of the Law of War on Land* (1880).

Likewise in 1873 was founded the Association for the Reform and Codification of the Law of Nations, which also meets periodically and which styles itself now the International Law Association.

<sup>1</sup> See Bentham's Works, ed. Bowring, VIII, p. 537; Nys. in *The Law Quarterly Review*, XI, (1885), p. 225.

<sup>2</sup> See Rivier's *Droit des Gens*, I, p. 40, where the full text of these twenty-one articles is given. They do not contain a real code, but certain principles only.

In 1874 the Emperor Alexander II of Russia took the initiative in assembling an international conference at Brussels for the purpose of discussing a draft code of the Law of Nations concerning land warfare. At this conference jurists, diplomats, and military men were united as delegates of the invited States, and they agreed upon a body of sixty articles which goes under the name of the Declaration of Brussels. But the Powers have never ratified these articles.

In 1880 the Institute of International Law published its *Manuel des Lois de la Guerre sur Terre*.

In 1890 the Italian jurist Fiore published his *Il diritto internazionale codificato e sua sanzione giuridica*,<sup>1</sup> of which a second edition appeared in 1898.

At the end of the nineteenth century the so-called Peace Conference at The Hague, convened on the personal initiative of the Emperor Nicholas II of Russia, has shown the possibility that parts of the Law of Nations may well be codified. Apart from three Declarations of minor value and of the Convention concerning the adaptation of the Geneva Convention to naval warfare, this Conference has succeeded in producing two important conventions which may well be called codes—namely, first, the Convention for the Pacific Settlement of International Disputes, and, secondly, the Convention with Respect to the Laws and Customs of War on Land. Whereas the future will still have to show whether the first-named convention will be of great practical importance, there can, on the other hand, not be denied the great practical value of the second-named convention. Although the latter contains many gaps, which must be filled up by the customary Law of Nations, and although it is in no way a masterpiece of codification, it represents a model, the very existence of which teaches that codification of parts of the Law of Nations is practicable, provided the Powers are seriously inclined to come to an understanding. The Hague Peace Conference has therefore made an epoch in the history of International Law.

Shortly after the Hague Peace Conference the United States of America took a step with regard to sea warfare similar to that taken by her in 1863 with regard to land warfare. She published on June 27, 1900, a body of rules for the use of her navy under the title *The Laws and Usages of War at Sea*—the so-called United States Naval War Code.<sup>1</sup> This code, which

<sup>1</sup> It will be observed that by the instructions of the Secretary of State the American delegation was directed to present the so-called United States Naval War Code of June 27, 1900, as the basis of discussion and model of a Hague convention on the subject. The inability of the Conference to agree upon many matters included in the naval war code showed that the subject did not seem ripe for codification and the American delegation requested



was drafted by Captain Charles H. Stockton, of the United States Navy, contains fifty-five articles which are divided into nine sections under the following titles: Hostilities; Belligerents; Belligerent and Neutral Vessels; Hospital Ships—the Shipwrecked, Sick, and Wounded; The Exercise of the Right of Search; Contraband of War; Blockade; The Sending in of Prizes; Armistice, Truce, and Capitulations, and Violations of Laws of War. I have no doubt that this American code will be the starting-point of a movement for a Naval War Code to be generally agreed upon by the Powers, similar to the Hague Regulations concerning land warfare.<sup>1</sup>

Passing now to the codification of the laws of land warfare, it will be seen that the subject is dealt with in three conventions: 1, the convention relating to the opening of hostilities; 2, the convention concerning the laws and customs of land warfare, with an annex in the form of regulations; 3, the convention concerning the rights and duties of neutral powers and persons in case of land warfare. Of each of these in turn:

## 2. THE OPENING OF HOSTILITIES

It is needless to state that the outbreak of hostilities is a very serious matter; for it converts peaceful subjects and citizens into enemies, and by a stroke of the pen or by word of mouth ends all non-hostile relations between the subjects or citizens of the belligerent States.<sup>2</sup> It abrogates or suspends treaties of certain kinds, and it taxes neutrals with burdens heavy to bear; for it deprives them of their right peaceably to pursue industry and commerce, and interferes with the peaceful and orderly business of the world. It is, therefore, a matter of great importance to determine when this hostile relation begins, not so much in the interests of belligerents because they have caused the outbreak of war and thus subject themselves

and received permission not to present the code. The discussions of the Conference show the difficulty of reaching an agreement in naval warfare where nations are animated by the desire to secure international recognition of their usages and customs rather than by mutual renunciation and conciliation to adopt a code in the interest of the community of nations.

<sup>1</sup> Oppenheim's International Law, Vol. I, p. 35.

<sup>2</sup> For a careful and elaborate discussion of the effect of war on trade, see *Kershaw v. Kelsey*, 100 Massachusetts Reports, 561 (1868).

to its pains and penalties, but in the interest of neutrals; for it is manifestly unjust that strangers to the controversy who by good offices and mediation may have sought to prevent the outbreak of war should be taxed with onerous duties and penalized for a violation, in ignorance it may be, of a status of war, which they could not prevent. Reason and humanity therefore conspire to determine clearly, and, if possible, in advance the moment when the peace of the world is disturbed, as the rights of belligerents force innocent and unoffending neutrals to renounce their rights solely and exclusively for the benefit of warring factions.

It is useless to consider the history of the practice of nations, because nations in the matter of war have been a law unto themselves and have exercised their sovereign right to declare and wage war according to their pleasure and convenience. It may be said further that war is a status and provable as such, whether it be evidenced by a declaration fixing the date or whether without declaration it dates from the first hostile act, or finally whether it be notified to neutrals by a simple statement of its existence.<sup>1</sup>

<sup>1</sup> In deciding the *Panama*, Locke, J., said: "The *Panama* sailed from New York before the 21st of April, 1898, and was upon the high seas at that time and at the time of capture. The fact that there had been no formal proclamation or declaration of war before she had sailed or at the time she was captured, or that she had at a recent date left a port of the United States, cannot be considered as exempting her from the liability of an enemy's property to capture, unless coming directly within the language of the President's proclamation. The practice of a formal proclamation before recognizing an existing war and capturing enemy's property has fallen into disuse in modern times, and actual hostilities may determine the date of the commencement of war, although no proclamation may have been issued, no declaration made or no action of the legislative department of the government had. This date has been declared by the act of Congress of April 25, 1898, and by the proclamation of the President of the next day to have been April 21, 1898, including that day, so that any Spanish property afloat, captured from that time, became liable to condemnation unless exempt by the executive proclamation."—The *Panama* 87 Federal Reporter, 927, 933 (1898). Affirmed on Appeal, The *Panama*, 176 U. S. 535 (1899).

For a list of wars begun without formal declaration, see *American Journal of International Law* (1908). Vol. II, pp. 57-62.

The question whether a nation determined to make war is obliged to notify its adversary before beginning hostilities, has been discussed for a long time, and has given birth not only to long theoretical discussions but to frequent and bitter controversies between the belligerents. From the point of view which we must assume here, it would be as vain to seek what has been the actual practice in the various wars since the beginning of the last century, as it would be to determine if it can be said that there is according to the positive law of nations, a law upon this subject. We need only ask ourselves if a law should be enacted and in what terms.<sup>1</sup>

In framing any general rule two points of view should be borne in mind, first, the declaration of war to the belligerents, who in all probability are prepared for the outbreak of war, and look forward to its declaration; and second, the notification to neutral States in order that they may inform their citizens and subjects and by a proclamation of neutrality warn them of the duties incumbent upon them by international law. These two matters, although connected, are nevertheless distinct; because the declaration of war creates a hostile relation between nation and nation, whereas the notification to neutrals informs them that the status created by war exists. Citizens or subjects of a nation are bound by the act of the sovereign power, and their rights and duties are measured by a declaration emanating from the constituted authority. The neutral on the contrary has no connection with the war, and is not a party to its declaration. The act of the belligerent is a unilateral act as far as the neutral is concerned, and he should not be taxed with the duties of neutrality before definite, precise

<sup>1</sup> M. Renault's Report to the Conference, *La Deuxième Conférence Internationale de la Paix*, 1907, Actes et Documents, Vol. I, p. 131.

For the discussion in Commission, see *La Deuxième Conférence Internationale de la Paix*, 1907, Vol. III, pp. 163-179.

The reader who desires to consider this subject in detail is referred to Col. Maurice's *Hostilities without Declaration of War from 1700 to 1870* (1883); Maurel's *Déclaration de Guerre* (1907); De Bailleul's *Hostilities sans Déclaration de Guerre* (1907). The two French treaties contain elaborate bibliographies.

Hall's *International Law* (5th ed.), pp. 377-385, contains an admirable brief history of the practice of nations.

and, if possible, official information be given him of the existence of war. The convention therefore is divided into two articles, the first dealing with the declaration of war between belligerents; and the second prescribing the information to be given to neutrals from the receipt of which neutral responsibility begins.

The first article therefore provides that

The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

An analysis of its wording shows that the Powers recognize the duty as existing rather than created; that war should not commence without previous and explicit warning; and that this notice should take the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war. In other words, the declaration may be of two kinds, either absolute, in which case the war dates from the declaration, or conditional, in which case the war commences either at the expiration of the time fixed in the ultimatum, or upon the failure to perform an act or duty within the time specified. It is absolute in the sense that the date specified in the declaration creates the hostile relation; it is conditional in the sense that the performance of the act or duty removes the cause of the war and obviates the necessity of a resort to arms.

Various attempts were made at the Conference to prescribe a time after the issue of the declaration and before which actual hostilities might take place; but the Powers felt that a preliminary declaration of war imposed a sufficient limit upon their sovereign powers and were therefore unwilling to restrain themselves from acts of hostility for any time after they had determined to resort to arms. It will be noted that the declaration and the ultimatum require a statement of the reason of the war, and it is to be hoped that the difficulty of a perfect justification may exercise a restraining influence upon prospective belligerents.



The second paragraph deals as has been said with the notification to neutrals, and is worded as follows:

The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which, may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.

An analysis of its provisions shows that the existence of war must be notified without delay and, as in the case of the declaration of war, it was attempted to fix a limit of twenty-four hours between the issue of the declaration and the beginning of war, so it was sought to establish a period of forty-eight hours between the receipt of the information to neutrals and the commencement of neutral duties. The Conference, however, was unwilling to accept such a limitation upon the right of the belligerent, even in behalf of the neutral, feeling that the duty to notify neutral powers without delay was a sufficient concession to the interests of peace. But the harshness of the provision was lessened by the proviso that the obligations of neutrals should not begin until the receipt of the notification, which may, however, be by telegraph. The main point is not that the neutral shall be notified in any particular manner or form, but that the notification shall actually be received; for it is only upon notification irrespective of the means that the neutral can properly be taxed with responsibility. Therefore, the concluding clause of the article provided that the neutral powers cannot rely upon the absence of notification, if it is clearly established that they were in fact aware of the existence of the war.

The Convention deals with international—that is external as distinguished from national or internal war; for it is not to be presumed that the Powers assumed the duty of notifying provinces or States, about to appeal to arms, of the status of war. The declaration does not apply to civil war, which exists but cannot well be declared.

As was said by Mr. Justice Grier in *The Prize Cases*:<sup>1</sup>

<sup>1</sup> Reported in 2 Black 635, 665, et seq. (1862).

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claims sovereign rights as against the other. Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the Party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest is a *war*; *they* claim to be in arms to establish their liberty and independence, in order to become a sovereign state, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

As a civil war is never publicly proclaimed *conomine* against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know. The true test of its existence, as found in the writings of the pages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, *civil war exists* and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land."

By the Constitution, Congress alone has the power to declare a national or foreign war. It can not declare war against a State, or any number of States by virtue of any clause in the Constitution.<sup>1</sup>

<sup>1</sup> For the beginning and ending of the Civil War in the different states of the union, see *The Protector*, 12 Wall, 700 (1871); *Brown v. Hialts*, 15 Ibid., 177 (1872); *Adger v. Alston*, Ibid., 555 (1872); *Batesville Institute v. Kauffman*, 18 Ibid., 151 (1873).

The following passage from a well-known case of the Supreme Court is not without interest to the Americans as showing the action of the Mother Country to the colonies:

The Parliament of Great Britain by statute (16 Geo. III, c. 5, 1776) declared that the vessels and cargoes belonging to the people of Virginia and the twelve other colonies found and taken on the high seas should be liable to seizure and confiscation as the property of open enemies, and that the marines and crew should be taken and considered as having voluntarily entered into the service of the King of Great Britain, and that the killing and destroying the persons and property of the Americans before

It must be admitted that the convention is very modest, for it leaves the Powers free to declare war at their pleasure, provided only that the pretext be capable of formulation. But it does in no uncertain measure safeguard the rights of neutrals and specifies the exact time at which they are to be taxed with responsibility. In so far, it is a positive gain and therefore worthy of commendation. It will be noted that the provisions of the convention are limited to Contracting Powers.

The convention does not change the nature of war and its declaration by the United States, for it is provided by the Constitution that Congress shall have power to declare war (Article I, section 8, clause 10). The President is not authorized by the convention to declare war, for this is a constitutional prerogative of Congress; but it does bind the President after the declaration of war by Congress, to communicate the declaration not merely to the belligerent but to neutral powers. The declaration of war is properly regarded as a national act and to be valid must be declared according to the laws and constitutions of the Contracting States. The international effect of the war, however, dates from the communication of the declaration and its notification to the neutral powers.

### 3. THE CONVENTION RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND

It may seem strange that at a peace conference so much of the time was taken up with the discussion of warfare on land and warfare on sea, and that so many conventions agreed to by the Conference and proposed to the various powers for ratification should deal with the subject of land and naval warfare. This fact seems a contradiction in terms, for

the passing of the act was just and lawful.—Per Chase, J., in *Ware v. Hylton*, 3 Dallas, 199, 328 (1796).

President Lincoln's proclamation of April 19, 1861, declaring a blockade of the coasts of the seceding states was in effect recognition of the belligerency of the Southern States, and the Proclamation of Neutrality of Great Britain, May 14, 1861, was justified in law as well as in fact.

although the First Conference was not officially designated a peace conference, it was by general consent referred to as such, and the Second Conference adopted the name long in advance. The fact that the peace conferences have dealt so largely with warfare has discouraged the pacifists, who believe that these conferences, peaceful in their origin, should meet to discuss merely the means by which peace may be preserved, and if broken, restored. That would be an ideal Conference, but we do not live in an ideal world. We live in a world in which war has frequently been the rule and peace the exception. To be of practical importance, therefore, the labors of the Conference must bear some relation to the needs of the immediate present, and by minimizing the hardship incident to warfare, look forward to a time when the resort to arms will not be so frequent or seemingly so necessary.

It is axiomatic that war should be divested of its unnecessary hardships, for it is barbarous enough at best. It is not only advisable but necessary to minimize in advance its dangers and by a codification to give clearness and precision to its rules and regulations. It is frequently said that the amelioration of warfare does not produce practical good; that the more barbarous the proceedings the less danger there will be of a resort to war. If that were so the savage state of man should indeed be the ideal one. If that were so the brutality and license of the Thirty Years' War should be the halcyon period to which the reformer should turn his gaze.<sup>1</sup> The poisoning of

<sup>1</sup> Until very recent times there is great ground for distrusting the accuracy of the figures which purport to represent the amount of slaughter at battles and sieges. It is said, however, that the population of Magdeburg, which was taken by storm, was reduced from 25,000 to 2700. The siege is described by an English eyewitness, whose account of it, generally regarded as authentic, constitutes those "Memoirs of a Cavalier" which are generally embodied in the works of Defoe. The writer states that out of 25,000 men, and some said 30,000, there was not after the storm a soul to be seen alive till the flames drove those that were hid in vaults and secret places to seek death in the streets rather than perish in the fire. Of these miserable creatures too some were killed by the fierce soldiers, but at last they saved the lives of such as came out of their cellars and holes, and so about 2000 poor desperate creatures were left. There was little shooting. The execution was all cutting of throats and mere house murders. Later



streams, the taking of towns by assault, the massacre of prisoners, the violation of the innocent, should therefore be looked upon with favor and not condemned. We know, however, that the mere fear of danger does not deter, just as we know that the fear of punishment does not prevent crime. Strange as it may seem, we also know that severe punishment instead of preventing crime leads to its increase. When all offenses are punished by excessive or by capital punishment, there is no check upon the criminal who has committed a small offense to keep him from committing a larger one, because he is not deterred by the punishment which in each case is equally great. If the danger of war and the severity of warfare do not act as a deterrent to war, it is nevertheless humanitarian to free it from suffering as far as possible. The Red Cross Convention of 1864, and the additional Articles of 1868, while they seem to legitimatize warfare, are eminently humanitarian in their nature and effect, and even the most enlightened who condemn warfare look upon these conventions as marking great progress. It is, therefore, from this point of view that I propose to discuss the convention regarding the rights and duties of neutral powers, with an expression of regret that it is still necessary to consider the laws and customs of war on land, and with the deeper regret that it is necessary to consider the subject itself at all. I would much prefer that the appeal be to reason before the sword is drawn, rather than after the sword has performed its bloody mission; but we live in a world of reality, and we cannot close our eyes to that fact.

historical information tends on the whole to relieve the memory of Count Tilly, the commander of the besiegers, from the infamy which has hitherto attached to it; but all sieges in that day were to the last degree homicidal, and there is a general impression that the peculiar ferocity of the soldiery after the capture of a town by storm was due to the Tartars, who had twice overrun what were then the most fertile and civilized portions of the world, and who never spared the population of the town which had resisted them. They appear to have considered that every stratagem and every degree of bad faith was justifiable for the purpose of inducing the garrison to surrender, but in the long run they never spared any man. Nor have the countries in which these massacres took place ever wholly recovered from them.—Sir Henry S. Maine's *International Law* (1888), pp. 123-125.

The project upon which the codification of 1899 and the revised convention of 1907 concerning the laws and customs of war on land is based, is the regulation issued in the year 1863 by President Lincoln for the government of armies in the field. Dr. Francis Lieber, by birth a German, by preference an American, a man who had had a long and varied career, serving as a private soldier upon the battlefield of Waterloo, later in the cause of freedom going to Greece, for many years an expounder of political science in Charleston, South Carolina, and finally professor in Columbia College, in the City of New York. Both by early training and by a lifetime's experience, he was qualified to codify the laws and customs of war on land. And this little pamphlet prepared by him, accepted by President Lincoln, and promulgated for the guidance of the armies, became at once a recognized text-book. It was, I might say, the first successful attempt to codify a branch of international law. It served as an impetus to Professor Bluntschli who prepared in the year 1868 his codification of international law.<sup>1</sup>

In 1874 it served as a basis for the proceedings of the Conference at Brussels called for the purpose of codifying the laws and customs of war.<sup>2</sup> The Conference drafted a series of rules and regulations dealing with land warfare, but its declaration was not ratified by the Powers. In the year

<sup>1</sup> In the letter to Dr. Lieber which forms the preface to *The Modern International Law of the Civilized States* in the form of a Code, Bluntschli says:

"Ihr glücklicher Gedanke, der amerikanischen Armee ein kurz gefasstes Kriegerrecht als Instruction ins Feld mitzugeben, und mit den Mahnungen des Rechts die wilden Leidenschaften des Krieges möglichst zu zähmen, hat mich zuerst zu dem Vorsatze angeregt, die Grundzüge des modernen Völkerrechts in Form eines Rechtsbuchs darzustellen und Ihre Briefe haben mich ermuthigt, dieses Wagniss durchzuführen."

As might be expected from the preface, Dr. Lieber's Instructions are referred to in the text and printed in the Appendix of the book.

<sup>2</sup> Of the importance and influence of Lieber's Instructions, Professor Nys has the following to say:

"Or, ces *Instructions* ont été copiées par un grand nombre d'Etats, leurs dispositions principales figurent dans le *Projet d'une déclaration internationale concernant les lois et coutumes de la guerre*, qui a été adopté dans la Conférence de Bruxelles de juillet-août 1874, dans le *Manuel des lois de la guerre sur terre* rédigé par l'Institut de droit international en 1880, enfin

1880 the Institute of International Law at its session in Oxford prepared a very careful and a very conscientious codification of land warfare based upon Dr. Lieber's code, as well as upon the labors of the Conference at Brussels. The Oxford Manual, which is considered by many to be the most excellent codification of the law of warfare, was the work of a private body. When published it won instant approval although it was not adopted by the governments. Therefore, in 1899 when the First Hague Conference met there were three projects before it, for its consideration and guidance: the first being the codification of Dr. Lieber recognized and enforced in a great civil war, and I might likewise say, used to a very considerable extent by France and Germany in the War of 1870; the Brussels

dans le *Règlement concernant les lois et coutumes de la guerre sur terre* adopté à la Haye en 1899. Dans le processus d'acceptation et d'adaptation, l'Europe ne s'est pas préoccupée du fait qu'il s'agissait, en définitive, de règles décrétées pour une guerre qui était envisagée dans un grand nombre de ses directions comme une guerre civile; elle a surtout considéré, l'œuvre américaine comme une œuvre empreinte de sentiments d'humanité faisant la part de la cruauté aussi restreinte que possible; elle s'est ralliée à des conceptions généreuses; elle a même ajouté à ce que les dispositions avaient d'humain. . . .

"M. Frédéric de Martens, dont la part de collaboration dans l'œuvre de la conférence de Bruxelles de 1874, et dans celle de la conférence de la Haye de 1899 [et de 1907] a été si considérable, faisait, en 1874, le plus grand éloge du règlement américain. 'Ainsi, écrivait-il, c'est aux États Unis de l'Amérique du Nord et au président Lincoln, qu'appartient l'honneur d'avoir pris l'initiative de définir avec précision les usages et les lois de la guerre. Cette première tentative officielle de codifier les usages de la guerre et de résumer dans un code les règles obligatoires pour les troupes, a notablement contribué à prêter un caractère d'humanité à la conduite des États du Nord dans le cours de cette guerre. Malheureusement, malgré l'utilité pratique incalculable des dispositions prises par Lincoln, son exemple n'a pas été suivi, jusqu'à présent, par aucun des gouvernements européens.' L'impulsion étant donnée; on sait le reste."—*Revue de droit internationale et de législation comparée* (1902), 2d series, Vol. IV, pp. 685-686.

For the list of countries which have followed Lieber's instructions, and for another foreign though less favorable appreciation of Lieber, see Professor Thomas Erskine Holland's admirable little book on *The Laws of War on Land* (1908), pp. 71-73.—"The Code," says Professor Holland, "is not well arranged, and its rules are in some respects more severe than those which would be enforced in a war between two independent states."

Convention of 1874, which was not ratified; and the private codification of the Institute of International Law. The conference acknowledged this heavy debt in the preamble to the conventions, the exact text of which is as follows:

Inspired by these views which are enjoined at the present day, as they were twenty-five years ago at the time of the Brussels Conference in 1874, by a wise and generous foresight;

[The contracting powers] Have, in this spirit, adopted a great number of provisions, the object of which is to define and govern the usages of war on land.

In 1907 the preamble is preserved with the necessary modifications:

Seeing that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert;

Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;

Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible;

[The contracting parties] Have deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following the Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land.

According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice;

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.



Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

They declare that it is in this sense especially that Articles I and II of the Regulations adopted must be understood.

The convention, it may be said, is composed of two parts; the first is general in its nature; the second consist of an annex, which contains the regulations respecting the laws and customs of war on land. There are two articles of the convention proper which deserve special attention. The first relates to the duty undertaken by the States to publish instructions in conformity with the Regulations for the use of the armed land forces (Article 1); the second contains a provision that a party violating the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces. (Article 3.)

Now these two paragraphs, respectively one and three of the convention, mean that the nations adopting the regulations undertake to prescribe them to their land forces so that the conduct of hostilities shall be in accordance with the regulations adopted at the Conference, and second that a sanction or penalty is prescribed for their observance by the solemn engagement of the powers to make compensation in case of the violation of their provisions. This is a new section not to be found in the conference of 1899, but which was taken from the Oxford Manual of 1880. These two provisions should be carefully borne in mind, because they prescribe a positive duty and impose a sanction for the violation of the regulations adopted.

The first section of the Regulations deals with belligerents and of the first section the most important chapter is that describing the qualifications of belligerents. Who is a belligerent? It is of course necessary to determine this,

because while belligerents are exposed to certain dangers, they are nevertheless afforded protection in proper cases. Classes not included within this category are in the first place not ordinarily amenable to the military code, and in the second place are not treated with the same leniency as belligerents in certain cases. There is here a conflict between the larger and smaller States. The standing army, no matter what the large nation may say, is meant for a warlike purpose. It may be said that it is for peace very much in the same way that a watchdog is maintained to preserve the safety of the household; but it is well known that in case the safety is endangered the watchdog is intended to come into play. Therefore, the large standing army maintained in peace only realizes the purpose of its existence in active hostilities. If there is a peace by virtue of it, it is an armed peace, not a natural peace which would result in the absence of the standing army. A large country with a large standing army wishes to make warfare a state affair, and to limit it to the armed forces which are well known. It wishes to restrict likewise the small State to the use of regularly organized, known forces. A reason given is, that if warfare be conducted by large recognized forces the noncombatants are not exposed to danger. The real reason is that a powerful invader does not wish to be troubled with the unorganized forces that may rise the instant a country is invaded. The struggle between the two views was and is extreme. The large country with its huge standing army would limit warfare to this army, and would treat as a mere rabble the inhabitants of an unoccupied country that rise against an armed force. On the contrary, the small State insists that its inhabitants have not merely the right but the duty, to rise and oppose the invader, and that being engaged in warlike purposes, they should not be shot or hanged, but treated with that consideration ordinarily extended to belligerents according to laws of war. It is unreasonable to suppose that a small State will renounce a right to rise *en masse* in the presence of the invader, in defense of its rights and of independence; but it is reasonable to insist that the subjects or

citizens rising *en masse* should be organized as troops under responsible commanders. That, the small countries are willing to concede, but they say that the invasion may be so sudden, that they have no time to organize, and that it is out of the question to provide uniforms. The result is the following compromise:

The laws, the rights, and the duties of war apply not only to the army but also to militia and volunteer organizations combining the following conditions:

1. Having at their head a person who is responsible for his subordinates.
2. Having a permanent distinctive sign recognizable at a distance.
3. Openly bearing arms.
4. Conforming to the laws and customs of war in their operations.

In countries where the militia or volunteer organizations constitute or form part of the army, they are comprised under the denomination of "army."

The resulting compromise (Article 1 of the Regulations) is thus in favor of the small powers, which refused to accept the convention in any form unless their rights were safeguarded and defined. Large nations cannot insist that the inhabitants rising on the approach of the invader be designated as for target practice. It would seem to be sufficient that they conduct themselves in the field according to the laws of war.

In the next article the right of the inhabitants to rise is granted in the following explicit language:

The inhabitants of an unoccupied territory who, on the approach of an enemy, spontaneously take up arms in order to repeal the invading troops, without having had time to organize in accordance with Article 1, shall be considered as a belligerent if they bear arms openly and respect the laws and customs of warfare.

The question is one of great difficulty and it cannot be denied that the opposing views of the larger and of the smaller States are sound and convincing in themselves, if only one side of the problem be considered. For example, if war is carried on by

organized armies under the control of responsible commanders, and if noncombatants are not to be treated as enemies in the field, it follows that the invader has a right to see at a glance who are and who are not combatants, because a commander cannot be expected to suspend operations in order to inspect the population in whose midst he finds himself and his army. It is true, on the other hand, that the country invaded cannot be deprived of the means at its disposal to resist the invasion and check its advance merely because these means may be disagreeable and dangerous to the invader. He has a right, however, to know who is his enemy, and if the use of force is to be restricted as far as possible to the actual combatant, the invader must be able to distinguish the soldier from the peaceable citizen; otherwise, there is danger that the invader will, in the interest of his own safety, treat the invaded population as hostile. To prevent a relapse to barbarism, the invaded country should use all the means at its disposal to designate that portion of its people incorporated with its regular armed forces, and if the exigencies of the moment do not permit the organization of the masses into a cohesive and armed force, the least that can be done, and the most that the invader can be asked to tolerate is that the improvised soldiers bear arms openly and respect the laws and customs of warfare. Otherwise, the noncombatant is an enemy in disguise and the peaceful citizen by daylight is the secret and deadly enemy by night. Warfare, which is becoming a relation of State to State and restricted to its armed forces, would become again a brutal contest between man and man, and soldier and bandit would be convertible terms.<sup>1</sup>

In the next article of this introductory chapter a twofold division is made into combatants and noncombatants. In

<sup>1</sup> For the animated discussions in the First Conference on this delicate and difficult subject, see *La Conférence Internationale de la Paix*, 1899, Second Commission, Second Sub-Commission, pp. 90-92; 119-126. A résumé of the discussion is given in M. Rolin's Report to the Conference, Plenary session of the Conference, pp. 36-37.

On the whole subject, see Hall's *International Law* (5th ed.), pp. 515-526.



case of capture by the enemy both have a right to be treated as prisoners of war. This leads insensibly to the provisions of Chapter II, relating to prisoners of war. It may be said generally that the Convention of 1899 and the revised Convention of 1907 took great pains with prisoners of war.<sup>1</sup> For example, prisoners are in the power of the hostile government but not in the power of the individuals who capture them, and are thus assured of careful treatment. All their personal belongings except arms, horses, and military papers remain their property. It is provided in a series of articles that prisoners of war may be interned in a town and bound not to go beyond fixed limits; that the captor may utilize the labor of prisoners according to their rank, provided that the task shall not be excessive; that the wages earned shall be utilized to mitigate their situation, and the surplus credited to them upon their discharge, after deducting the cost of maintenance.

These provisions are highly humanitarian. It is the merest truism to say that work is much better for soldiers than idleness. It is necessary, however, to exclude from their field of operation any work that may distinctly relate to the progress of hostilities; for prisoners cannot honorably be required to serve directly or indirectly against their country, and in the next place, if they work, as the State has the right to compel them to, it is provided that they shall be paid for their labor, that their wages shall go to the improvement of their position and that the balance paid them upon their release. The regulations further declare that the government into whose hands prisoners of war have fallen is charged with their maintenance and that, in the absence of agreement, prisoners and soldiers of the army of the captor shall be treated upon an equal footing. Either it is necessary to watch the prisoner or to free him on parole, that is, on his word of honor that he will not serve during the war or until exchanged, and for this purpose there are appropriate directions in the convention. Escaped prisoners

<sup>1</sup> Convention of 1899, Articles 4-20; Revised Convention of 1907, Articles 4-20.

who are retaken before rejoining their army may be disciplined, but prisoners who succeed in escaping and afterward fall into the hands of the original captors shall not be punished therefor. Success is in this case a justification, as often happens.

Without further insisting upon these interesting and proper provisions, Article 13 is reached, which deals with a class of persons associated with the army, although they do not take part in active hostilities.

Persons who follow an army without being directly connected therewith, such as newspaper correspondents and reporters, sutlers, and furnishers of supplies, who fall into the hands of the enemy and whom the latter deems it necessary to hold shall be entitled to treatment as prisoners of war, provided they possess a certificate of identity from the military authority of the army which they were accompanying.<sup>1</sup>

Articles 14, 15, and 16 cannot be too highly commended. They appeared in a less perfect form in the convention of 1899 and they are in their present form eminently humanitarian. For example,

An inquiry office for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. It is the function of this office to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting in-

<sup>1</sup> By the law and practice of civilized nations, enemies' subjects taken in arms may be made prisoners of war; but every person found in the train of an army is not to be considered as therefore a belligerent or an enemy. In all wars, and in all countries, multitudes of persons follow the march of armies, for the purpose of traffic or from motives of curiosity, or the influence of other causes, who neither expect to be, nor reasonably can be, considered belligerents. . . .

There would be no meaning in that well-settled principle of the law of nations which exempts men of letters and other classes of noncombatants from the liability of being made prisoners of war, if it were an answer to every claim for such exemption to say that the person making it was united with a military force, or journeying under its protection.—Daniel Webster, Secretary of State. Moore's Int. Law Digest, Vol. VII, pp. 217-218.

ternments and transfers, releases on parole, exchanges, escapes, admissions into hospitals, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The office must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.

It is likewise the function of the inquiry office to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle or left by prisoners who have been released on parole, or exchanged, or who have escaped, or died in hospitals or ambulances, and to forward them to those concerned. (Article 14.)

Article 15 deals with the relief societies for prisoners of war.

Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort shall receive from the belligerents, for themselves and their duly accredited agents every facility for the efficient performance of their humane task within the bounds imposed by military necessities and administrative regulations. Agents of these societies may be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the latter may issue. (Article 15.)

Article 16 provides that:

Inquiry offices enjoy the privilege of free postage. Letters, money orders, and valuables, as well as parcels by post, intended for prisoners of war, or dispatched by them, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.

Presents and relief in kind for prisoners of war shall be admitted free of all import or other duties, as well as of payments for carriage by the State railways. (Article 16.)

Article 20 reads as follows:

After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

It needs no argument to show that these provisions are thoroughly humanitarian, and if they do not, as they cannot, remove hardship from the battlefield, they at least try to alleviate the condition of prisoners and of the sick and wounded.

Article 17 dealing with officers, provides that when prisoners, they shall receive the same rate of pay to which officers of the same grade are entitled in the country of their detention, and that the amount so advanced be repaid by their government. This is a wise provision because it frequently happens that officers are dependent upon their pay. If they do not receive it they are helpless, for it is impossible to send according to ordinary rules, messages or matters across the enemy line.<sup>1</sup> Therefore, the article provides that they shall receive the pay they were accustomed to, but that it shall be at the end of the war reimbursed to the captor.<sup>2</sup>

Chapter III deals with the sick and wounded, providing that the obligations of belligerents are covered by the Geneva Convention. (Article 21.) Section II deals with active hostilities, Chapter I of this section treats of the means of injuring the enemy of sieges and bombardments.

Article 22 seems cruel. It is cruel, still it is an advance.

The right of belligerents to adopt means of injuring the enemy is not unlimited. (Article 22.)

Article 23 provides certain prohibitions among which are the following:

In addition to the prohibitions provided by special conventions, it is especially forbidden—

- a. To employ poison or poisoned weapons;
- b. To kill or wound treacherously, individuals belonging to the hostile nation or army;

<sup>1</sup> For the learning on the subject, see case of *Kershaw v. Kelsey* (1868), 100 Mass. Rep., 561.

<sup>2</sup> Articles 14-20 were proposed in 1899 by the distinguished Belgian statesman, M. Beernaert, and adopted unanimously almost without objection. See *La Conférence Internationale de la Paix*, 1899, part III, Second Commission, Second Sub-Commission, pp. 74-75.



c. To kill or wound an enemy, who, having laid down his arms or having no longer means of defense, has surrendered at discretion;

d. To declare that no quarter will be given;

e. To employ arms, projectiles, or material calculated to cause unnecessary suffering;

f. To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

g. To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

h. To declare abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

Paragraph *h* is an addition to the Conference of 1899, but will probably commend itself.<sup>1</sup>

War is to be limited to the citizens and subjects of the respective states. Some of the humanitarian provisions follow:

#### ARTICLE 25

The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

#### ARTICLE 26

The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

#### ARTICLE 27

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

<sup>1</sup>But see on this point Professor Holland's *Law of War on Land* (1908), Sec. 77, note, p. 44.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

#### ARTICLE 28

The pillage of a town or place, even when taken by assault, is prohibited.

These four articles are designed to restrict, as far as possible, the hardship of war to actual combatants and to the public property of the belligerents. The purpose of war is no longer to produce submission by the wanton destruction of non-combatants and private property; but to crush resistance of the enemy in arms, and to subject national property to destruction or to enemy use in order to exhaust the means of resistance, whether it be animate or inanimate. The slightest knowledge of the history and practice of warfare shows the advance registered by these articles, which, however, are a mere codification of existing practice rather than an innovation.<sup>1</sup>

Spies are treated of in Chapter II, and the term "spy" is defined and limited to the person who enters the zone of operations of a belligerent stealthily in disguise.

Information concerning the movements of the enemy is indispensable to success, but the spy has always been harshly treated. The calling is treated as dishonorable, however honorable the individual spy may be, and death is the punishment inflicted. But however dishonorable the calling, and however severe the punishment, the people of Great Britain are not likely to regard Major André as unworthy of respect, and our own countrymen revere the memory of Nathan Hale. A monument to the one is in Westminster Abbey, and a beautiful statue of the other greets the foreigner upon his arrival in New York.

<sup>1</sup> For model instruction to an invading army, see Robert E. Lee's General order No. 72, dated Chambersburg, Pa., June 27, 1863.

It is at times difficult to decide who is and who is not a spy. The first paragraph of Article 29 defines the spy as follows:

A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

The second paragraph is perhaps more successful in excluding certain persons from the category of spies, and the treatment to be accorded to them:

Thus soldiers, not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians carrying out their mission openly, intrusted with the delivery of dispatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying dispatches and, generally, of maintaining communications between the different parts of an army or a territory.

Chapter III declares flags of truce to be inviolable. (Article 32.) Chapter IV codifies existing practice by stating that capitulations are to be strictly enforceable, and shall not be violated. (Article 35). Chapter V deals with armistices, stating how they may be concluded, and to what extent they suspend military operations by mutual agreement. (Articles 36-41.)

Then comes a section very important indeed, dealing with military authority in the territory of the enemy. It may be briefly summarized as follows:

The enemy taking possession, dispossesses the legitimate sovereign for a temporary purpose. Therefore, he should be limited to the temporary use of the public buildings, and to the use of the public land. His regulations should not extend beyond the time of his occupation, because the right to legislate, depending upon occupation, should not extend beyond it. In the same way, if his right to legislate depends upon his occupation, it should not apply to matters beyond military control. In a word, he should act as a usufructuary not as an

owner of the ultimate interest. He should preserve the sanctity of private property. If necessary for military purposes it may be destroyed. He should not support his administration at the expense of the individual but at the expense of the State, and if it is necessary to exact sums of money (contributions) or to take possession of articles in kind (requisitions), they should be taken from individual owners, and receipts given so that the home government may pay for them at the end of the war

#### ARTICLE 55

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

#### ARTICLE 56

The properties of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

To summarize the convention and the regulations in a few sentences. War is a relation between State and State. It should as far as possible be limited to actual, armed belligerents, who should carry arms openly and be recognizable at a distance, by uniform or other sign. All needless suffering should be avoided, the use of poisoned weapons prohibited, as well as the use of instruments causing serious injury, that is, greater injury than that necessary for the immediate purpose, namely, to stop the enemy. Prisoners should be humanely treated. Noncombatants should be uninjured in life and property. The right of the belligerent to occupy territory should be measured by his occupation, and should not extend in time or space beyond the actual field of operations. Nothing should be done by the invader to affect ultimate owner-



ship of the buildings or property occupied. Private property necessary for military operations may be taken; it may be destroyed. If used for military purposes it should be paid for; if in kind or in money, a receipt should be given to its owner, so that the home country may at the conclusion of peace compensate its subject or citizen for the loss.

No matter how carefully drawn a convention may be and how clear and explicit its regulations, it is to be feared that either the letter or the spirit will be violated. To be serviceable in the campaign, the paragraphs must be few in number, and comprised within the smallest compass. Much must, therefore, be left to the discretion of the commander, and in the heat of action it is too much to expect that the interpretation of the soldier in the field will always be in accord with that placed upon it by the scholar or student in his study and retirement. It is the intention of the Conference that the provisions of the convention be supplied to the armed forces of the contracting parties for their instruction and guidance, and in order that the regulations as a whole shall be mastered, and that violations may be as infrequent as possible, the convention specifically provides in Article 3 that the belligerent violating the regulations shall be liable in damages.

The convention in its original and revised form recommended the regulations, and by signing the convention and communicating the regulations to every army, the good faith of the contracting party is engaged and a moral obligation created to observe them. The Convention of 1907, marks a great and salutary advance: for the moral obligation of 1899 a legal obligation is created with a penalty for its nonobservance or violation.<sup>1</sup>

<sup>1</sup> For the discussions of 1899, concerning the Laws and Customs of Land Warfare, see *Conférence Internationale de la Paix*, 1899, part III, pp. 69-128.

For the revision of 1907, see *La Deuxième Conférence Internationale de la Paix*, 1907, vol. III, pp. 101-149; 8-15.

#### 4. CONVENTION RESPECTING THE RIGHTS AND DUTIES OF NEUTRAL POWERS AND PERSONS IN CASE OF WAR ON LAND

This convention deals with the rights and duties of neutral powers and persons in case of land warfare, and is but the fragment of a more extended and ambitious draft in the nature of a codification of neutral rights and duties. The purpose and the limitations of the convention, as indicated in the first paragraph of the preamble, are to lay down more clearly the right and duties of neutral powers in case of war on land, and regulate the position of belligerents who have taken refuge in neutral territory. The second paragraph of the preamble states that the Conference is desirous of defining the meaning of the term neutral, pending the possibility of settling in its entirety the position of neutral individuals in their relations with the belligerents. It may be admitted that the subject itself is beset with difficulties, and that the definition of neutral and belligerent rights is a task to tax, not merely a conference sitting for a few months, but the home government aided by expert advice and the experience of the past. The real difficulty, however, the rock on which the convention split, lay in the fact that two principles were in play, each striving for mastery, namely, the principle of nationality and the principle of enemy domicile. By the principle of nationality, a neutral residing in the territory of a belligerent forms no part of the community, although he may have established himself in business, and may derive wealth and social station from residence in such a community. He is an alien, a stranger to the supreme struggle in which the life and death of the State may be involved. His allegiance is to his home government to which he looks for protection from the confusion, turmoil and hardship of war, and on the principle nationality the home government is bound to protect its citizens or subjects although in *partibus infidelium*. It cannot be doubted that much is to be said for this point of view, because, while an alien resident contributes to the prosperity of the country, he desires to live

at peace, and if he preserves peace he does not sacrifice his neutrality. A strong neutral nation, with citizens and subjects in various parts of the world, finds these to be the advance agents of commercial and industrial supremacy and naturally desires to protect them. A preferred position is thus created for its subjects in belligerent parts, and in the interests of neutrality much is to be said for this theory.

On the other hand, the doctrine of enemy domicile is not without its supporters. An alien cannot well ask that he possess greater rights in the chosen country of his residence than enjoyed by the native born. He receives the protection of their law in time of peace, he prospers in the community and acquires influence. In time of peace the distinction between the native born and the alien is regarded as unfriendly discrimination. The moment that war breaks out the native born is subject to military duty, his allegiance to his government causes him to sacrifice his life, and his property is exposed to seizure and destruction if not to unmeasured confiscation. The belligerent feels that a distinction between the native born and the alien operates in favor of the foreigner, and in a time of commotion and danger he is as unwilling to create a favored class as he is to withdraw alien residents and their property from the service of the country of their adoption. A belligerent State, therefore, is inclined to look with disfavor upon the distinction drawn between the neutral residing upon its territory and to subject his property to its control. It objects to the creation of an *imperium in imperio*. It is not to be wondered, therefore, that the Conference found difficulty in the situation, and was unable in the limited time at its disposal to reconcile the divergence of opinion. The trouble, lay, however, with the subject, not with the Conference, and until a compromise between the principles of nationality and enemy domicile is reached, it is doubtful if a comprehensive and satisfactory convention concerning the rights and duties of neutrals in belligerent territory can be devised and framed. The general principles of neutrality, however, are capable of ascertainment and codification, and the Conference was suc-

cessful in defining, elaborating and in bringing them to acceptance. The difficulty arose when the jarring principles of nationality and enemy domicile thrust themselves upon the Conference.

The convention as finally adopted is divided into five chapters, respectively dealing with the rights and duties of neutral Powers (Chapter I); belligerents interned and wounded tended in neutral territory (Chapter II); neutral persons (Chapter III) railway material (Chapter IV); and final provisions of a purely formal nature (Chapter V).

The point of view of the first chapter is that neutrals are no longer suffered and tolerated, but that they have acquired a standing in international law with rights of their own. As peace is the normal status of society, belligerents no longer possess exclusive rights; they are subject to clearly defined duties which daily increase. This point of view was forced upon the Conference by Belgium.

Several of the duties of neutral States have for their object to forbid the toleration on their territory of actions which the belligerents should not be permitted to perform.

It is proper, therefore, not to limit oneself to the statement that neutrals are held to prevent such acts. It is essential to declare that the obligations of neutrals in regard to these matters arise from a general inhibition, which, logically, concerns chiefly and in first instance the belligerents, before producing duties for the neutrals.<sup>1</sup>

In other words, the point of approach adopted by the Conference was to define the right of the belligerent, and in imposing a limitation upon his action to tax him with the performance of a duty. The first article is declaratory of international law, namely, "the territory of neutral powers is inviolable;" but from the viewpoint of the Conference it seemed advisable to proclaim this natural and absolute right, which, when established, imposes a duty on the neutral to maintain the neutral character of its territory. The succeeding articles, 2, 3 and 4,

<sup>1</sup> Report of Colonel Borel, *La Deuxième Conférence Internationale de la Paix*, 1907, *Actes et Documents*, Vol. I, 137-138.



impose a duty upon belligerents by forbidding them to make use of neutral territory, either for moving troops or convoys of munitions of war or supplies across neutral territory; or from using neutral territory as a basis of hostile action by erecting on neutral territory wireless telegraphy stations or other apparatus for the purpose of communication with belligerent forces on land or sea; or to use any installation of this kind established by them before the war on neutral territory for purely military purposes, which installation has not been opened for public messages; or to recruit troops, or to establish recruiting agencies upon neutral territory. The purpose of these articles is well-nigh self-evident. Neutrality is a recognized status which the belligerent is forced to recognize. It is true that the neutral should not permit such use of its territory, and Article 5 imposes this duty upon the neutral. In the language of the older law, a duty would be imposed upon the neutral to prevent any of these actions. The recognition of neutrality as a right shifts the burden to the belligerent who is specifically forbidden to do any one of the prohibited acts. A duty is, however, imposed upon the neutral to prohibit the commission of these acts, but the duty imposed is coëxtensive with the power to prevent. Thus, the neutral is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory. The duty is therefore limited to the act committed on neutral territory subject to the control of the neutral. The citizen or subject of the neutral in foreign parts, who may have violated the previous provisions, is beyond the control of the neutral, and therefore the neutral is not held responsible for acts which he could neither control nor prevent. In this respect the duty is limited; but from another point of view the duty is enlarged, because the convention looks to neutral territory and regards domicile, not nationality, as the controlling principle. The neutral is bound to prevent the commission of these acts by its own citizens and subjects or aliens within its territory. It is interesting to notice in this connection that the principle of domicile is adopted to the exclusion of nationality.

Articles 6, 7 and 8 form, as it were, a second group, recognizing the fact that the neutral is not taxed with responsibility by the mere fact of belligerency because neutral subjects or citizens are engaged in certain transactions permissible in peace, but questionable in war. The right of the neutral is admitted but stated negatively rather than positively. For example, the responsibility of a neutral is not involved by the fact that persons cross the frontier individually to offer their services to a belligerent (Article 6). Nor is a neutral called upon to prevent on behalf of one or the other of the belligerents, the export or transport of arms, munitions, or in general of anything which can be of use to an army or a fleet (Article 7). Nor, finally, is the neutral required to forbid or restrict belligerent use of telegraph, or telephone cables, or of wireless telegraphy belonging to it, or to companies or private individuals (Article 8). The belligerent is forbidden to make neutral territory the basis of hostilities, for troops may not be enlisted nor recruiting stations established in neutral territory, and the neutral is obliged to prevent such unneutral use of its territory. But the use of neutral territory as a basis is objectionable and the neutral should and is therefore bound to prevent it; but the passage of its frontier by unorganized, isolated groups, even although their intention be to join one or other of the belligerents, is not the use of neutral territory as a basis of operations. If such acts be committed on a large scale, the neutral is taxed with knowledge and therefore with responsibility; but, without an elaborate secret service and without watchfulness incommensurate with results, the neutral cannot examine the individual leaving its borders in order to ascertain his ultimate purpose. Therefore, the neutral nation should not be taxed with responsibility, and by the convention it is not.

In the next place, the right of the neutral to engage in peaceful pursuits is expressly acknowledged, and its citizens or subjects are not to be forbidden to export or transport arms, munitions of war or articles of commerce, even although

destined for either one of the belligerents. If limited to a particular belligerent, the act would be partisan and therefore forbidden, but general trade and commerce are permitted. This is a conventional recognition of the fact that trade in contraband is neither forbidden nor unneutral, although under certain circumstances the property may doubtless be seized and confiscated before it reach the belligerent. The neutral shipper undertakes the risk and assumes the responsibility. Such has been and is the law of England and the United States.<sup>1</sup> And, finally, the older conception of neutrality, namely, impartiality, is recognized in that the belligerent use of means of communication is not forbidden, provided no discrimination is shown for or against either belligerent. (Article 9.) It should be noted, that the neutral may permit these acts and that such action on its part is not unneutral; it may, however, forbid them: the matter is vested in the sound discretion of the neutral, provided only that impartiality be observed.

The neutral is bound to prevent the commission of unneutral acts within its territory, and, should it resort to force, the conclusion is as obvious as it is just that the means taken to prevent the violation of its neutrality cannot be regarded as a hostile act; for the purpose of the act is not to aid one belligerent by inflicting injury upon the other, but to preserve neutrality. (Article 10.)

The five articles composing Chapter III deal with belligerents interned and wounded tended in neutral territory. They define the duty of the neutral to prisoners who seek refuge within its territory, and prescribe the treatment to be accorded to them. The purpose of the chapter, therefore, is to protect the neutral from abuse of hospitality, and, at the same time, to secure protection to the prisoner, or to sick and wounded within its jurisdiction. The provisions of the section are therefore largely of a humanitarian nature. With the exception of Arti-

<sup>1</sup> The Helen Law Reports, 1 Adm. & Ecc. 1; *Seton v. Low*, 1 Johnston's Cases 1 (1799); *Northern Pacific Rwy. Co., v. Northern American Trading Co.*, 195 U. S. 439 (1903), 21 Op. Atty. Gen. 267; *Ex parte Chavasse*, 34 Law Journal, N. S. Bankruptcy 17 (1865).

cle 13, which is new, the articles have been transferred from the Convention of 1899, "Respecting the laws and customs of war on land" (Articles 57-60), as it seemed to the drafting committee that they naturally belonged to a convention regulating the rights and duties of neutrals, rather than to a convention dealing with the laws and customs of land warfare, in which belligerents were the chief parties and neutrals but incidents. It should also be said that these articles were devised not merely in the interest of the prisoners, but in the interest of the small States adjoining powerful belligerents, such as Belgium, Luxemburg, and Switzerland; for in recent wars large bodies of fugitives have sought refuge in neutral States, and in the Franco-Prussian War a French army under Bourbaki crossed the Swiss frontier in order to escape pursuit and capture.

In the first place, a neutral power which receives on its territory troops belonging to the belligerent armies shall intern them as far as possible at a distance from the theater of war; it may place them in camps and confine them in fortresses or in places set apart for this purpose; and, finally, it shall decide whether officers should be left at liberty on parole not to leave the neutral territory without permission. (Article 11.)<sup>1</sup> It will be noted that no duty is imposed upon the neutral to extend hospitality to belligerent fugitives: it is permitted to receive them without subjecting itself to criticism. If, however, it does receive them, it shall exercise such control and supervision as to prevent them from rejoining their commands. For this purpose, it seems advisable to remove them as far as possible from the theater of war, and to confine them in camps or even fortresses, in order to prevent the possibility of their further participation in the war. The demands of hospitality, however, may make serious inroads upon the neutral; for fugitives are ordinarily without the means of support and in the interest of humanity they should be supplied with food, clothing and relief. This may involve a serious outlay, and it may be that the neutral in anticipation of such eventuality

<sup>1</sup> Article 57 of the Convention of 1899.



may have concluded a special convention regulating its duties in the premises. In any case, the outlay should be recompensed because the neutral is not a party to the war; it did not invite the fugitives and should not bear the expense incurred by its act of hospitality. Therefore, at the conclusion of peace the expenses caused by the internment are to be reimbursed by the government of the fugitives. (Article 12.) What treatment shall the neutral accord to escaped prisoners of war? It may receive them, it cannot well refuse them admission, but it clearly should recognize the status acquired by the escape. The prisoner was subject to capture, but within neutral territory he is neither a combatant nor prisoner. Therefore, the convention provides that the neutral shall act as the agent of neither belligerent. Escaped prisoners shall be left in possession of that which they have acquired by flight, namely, their liberty. If, however, the neutral allows them to remain in its territory, it may assign them a place of residence lest their presence be a danger or a menace. It may happen that troops crossing the neutral territory may have in their control prisoners of war. It would seem in this case that the prisoners of the fugitives should be set at liberty; for the fugitive by submitting to neutral jurisdiction has renounced his belligerent rights as captor, and he cannot insist that the neutral act as jailor. Such is the convention. (Article 13.)

The interests of humanity seem likewise to require that the sick and wounded of the belligerent armies may enter neutral territory. But, lest the neutral territory be turned into an army hospital, it seems not only reasonable but essential that such a duty should not be imposed upon the neutral. The neutral should not be required to receive the sick and wounded; it may in its discretion do so. But it would seem reasonable that the neutral be permitted to impose the condition that the trains bringing them shall carry neither personnel nor war material. The train is assimilated to an ambulance and the neutral territory is, as previously said, a hospital, where personnel or war material is clearly out of place. If,

however, the neutral permits the entry of the sick and wounded, it binds itself to take whatever measures of safety and control are necessary for the purpose. The neutral is not the agent of either belligerent: if it decides to open its territory to sick and wounded it must do so impartially; for it could not care for the sick and wounded of one belligerent to the exclusion of the other without discriminating, and discrimination is unneutral. The neutral is actuated by humanitarian motives. It seeks to restore the sick and wounded to health, because they are men in distress not because they are soldiers, and, in restoring them to health, it does not undertake to furnish the belligerents with a fresh supply of soldiers. Therefore, they must be guarded by the neutral power so as to prevent their taking further part in the war. (Article 14.) As a further indication of the humanitarian nature of this entire section, Article 15 provides that the Geneva Convention applies to sick and wounded interned in neutral territory.

Chapter III consists of but three articles saved from the wreck of a German proposition, dealing with the rights of neutral persons, a preface, an introduction, a head without a body, to use the expression of Baron Marschall von Bieberstein regarding the inadequate result of weeks of deliberation. The chief characteristic of the German proposition was the substitution of the principle of nationality for enemy domicile, creating in belligerent countries, as has been previously said, an *imperium in imperio*. The two principles are not only opposed but seemingly irreconcilable, and the triumph of the one necessarily involves the defeat of the other. Prolonged deliberation in the commission, and indeed in the plenary session of the Conference showed, to use a favorite expression of Baron Marschall von Bieberstein, that the question was not ripe for solution, and that the Conference was unwilling definitively to accept either principle to the exclusion of the other. In such circumstances a compromise was impossible. The utmost that the Conference could do was to adopt the introductory articles and those portions of the subject which permitted of compromise, to call the attention of

the powers to the importance of the commercial and industrial relations between belligerent and neutrals, and to recommend that the Powers regulate these relations by special agreement or treaty.<sup>1</sup>

The spirit of the German project was thus stated by General Davis of the American delegation:

This delegation considers the proposition submitted by the French delegation (Articles 1-10 of the present convention) as very meritorious, in that it determines the neutral duty of a state touching its relation with belligerent powers in time of war. The position thus described has been followed by the United States of America more than a century, but the articles by the German delegation are more advanced and establish a status for neutral inhabitants in belligerent territory. The status thus established appears to me to conform to the conditions of modern commerce. For commerce no longer is limited to a single State but reaches out to many. It does not seem necessary to explain to the commission the extent and importance of these relations, nor the importance of preventing their useless interruption in time of war.

The rules submitted by the German delegation cover this point. Nay, more, they define the rights, the duties, the immunities of a neutral inhabitant of a belligerent State in time of war. They exempt him from the burdens of a distinctly military character, and they release his property from military contributions. If there be a military necessity to confiscate or to use his property he should receive specific and generous compensation.

In all other respects his situation is not changed. His property is taxed for the support of the civil administration and if the military administration of civil affairs is more costly than the ordinary administration he ought to pay his proportional part of the excess. The proposed rules grant him only exemption from specific military contributions.

The delegation of the United States considers that this is a distinct progress for humanity and for the exact definition of the rules and obligations of neutrals, and for these reasons it is happy to support the proposition of the German delegation.<sup>2</sup>

<sup>1</sup> See Final Act, *vœux* 2 and 3, Vol. II, p. 289.

<sup>2</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. III, pp. 193-194.

The articles referred to by General Davis were presented by the German delegation as additions to the convention dealing with the Laws and Customs of War on Land and were therefore numbered 61 to 72.

See Appendix, pp. 821-823, for the German proposition, divided into three chapters, and intended by its numbering to continue the old convention concerning war on land.

Let us now consider the articles actually voted. The first article of this section (Article 16) defines neutrals, and properly, because without an authoritative definition of a neutral it is clearly impossible to fix neutral rights and duties. A neutral, in the language of the convention, is the national of a State, not taking part in the war, and he cannot avail himself of his neutrality if he commits hostile acts against the belligerent, or if he commits acts in favor of a belligerent, particularly if he takes service in the armed force of one or other of the parties. In such case he renounces neutrality. The convention, however, provides that he shall not be more severely treated by the belligerent against whom he has renounced his neutrality than a national of the other belligerent State for the same act, a self-evident proposition.

It may be, however, that the neutral residing in belligerent territory furnishes supplies or advances loans to the other belligerent. In such a case it is important to determine whether the principle of nationality be accepted, for, if so, the neutral has by voluntary act sacrificed his right to neutral character and therefore protection. If the principle of enemy domicile be accepted there can be no doubt about the nature of the act. It is trading with the enemy and illegal, whether undertaken by native or alien. This conclusion is reached by Article 18 which states that supplies furnished or loans made to one of the belligerents shall not be considered as unneutral acts provided the neutral lives neither in the territory of the other belligerent nor in territory occupied by him and provided further that the supplies do not come from these territories. An exception is very properly made in favor of services rendered in matters of police or civil administration; for in times of commotion and disorder a neutral may perform genuine service in police or civil administration of his domicile. And it is difficult to see how such service can be considered unneutral inasmuch as it has nothing to do with war or its conduct.

These articles were followed in the original German proposition by a series providing that belligerents should not require services from neutrals directly concerning war although an



exception was made of sanitary and police duty demanded by military necessity; but such services as far as possible should be paid for in ready money and if not so paid for a receipt should be given for payment as soon as possible (Article 66); that neutral nations should forbid their nationals to serve in the ranks of either belligerent (Article 65); that no contributions of war be levied upon neutrals excepting therefrom exactions necessary for the administration of occupied territory (Article 67); that neutral property should neither be seized, injured nor destroyed unless required by the necessities of war, in which case compensation should be made upon the principle of reciprocity (Article 68); that the use of real property belonging to neutrals should be paid for if the neutral State likewise recognizes the duty of payment (Article 69); and finally that movable property belonging to a neutral should neither be confiscated nor used except upon payment (Article 70).

Article 65, imposing a duty upon a neutral to prevent a citizen from taking service with one or other of the belligerents, was objected to on the ground that the duty of the neutral was passive not active, and that it would be difficult to prevent neutrals residing in the territory of either belligerent from taking service.<sup>1</sup> In consideration of these objections the German delegation withdrew the proposition.

Article 64 provided that belligerents could not solicit or accept from neutrals services relating directly to war. It was insisted by the Netherland delegation that the provisions of Article 64 should not apply to a neutral who prior to the outbreak of war had enlisted voluntarily in the army of one

<sup>1</sup> Since 1818, this has been the law of the United States: "Every person who, within the territory or jurisdiction of the United States, enlists or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, shall be deemed guilty of high misdemeanor, and shall be fined not more than one thousand dollars, and imprisoned not more than three years.—*Revised Statutes of the United States*, Sec. 5282.

of the belligerents, which interpretation met with approval and was adopted as the first clause of the new Article 65 to take the place of the one withdrawn by Germany. It was next stated that the prohibition of Article 64 did not apply to persons belonging to the army of a belligerent State by virtue of its legislation, for it appears that the laws of several States require military service either generally or specifically from strangers domiciled in their territory in cases in which the alien has not performed military service in the home country. This clause was adopted as the second paragraph of the new Article 65, although it is self-evident that the latter clause of Article 65 is irreconcilable with the provisions of Article 64; for Article 64 prevents belligerents from requiring military service from neutrals, whereas the second clause of the Article 65 recognizes the right of the belligerent by local legislation to force military service upon neutrals. The inconsistency was recognized and both articles were stricken from the projected convention.

The various Articles 66-69 of the German proposition, concerning neutral property, of which a summary has been given, were voted by 6 to 5 and 1 abstention in the Committee of Examination, but in the commission they were suppressed by a vote of 18 to 11 and 10 abstentions, 10 States not responding to the roll-call.<sup>1</sup>

Articles 70 to 72 of the original German proposition provided briefly that the belligerents were authorized to appropriate and use, upon immediate payment, all the movable property of neutrals within their territory (Article 70); that neutral vessels and their cargoes might be appropriated or employed by a belligerent only if the vessels in question ply on rivers within its own or enemy territory, and that in case of appropriation the compensation due to the neutral shall be the value of the vessel, cargo and 10 per cent profit, and in case of use, 10 per cent increase of the ordinary freight (Arti-

<sup>1</sup> Report of Colonel Borel, *La Deuxième Conférence Internationale de la Paix*, 1907, *Actes et Documents*, Vol. I, pp. 153-156.

cle 71); and that the compensation for destruction or injury of movable property belonging to neutrals should be regulated in accordance with principles set forth in Articles 70 and 71 (Article 72).

As a result of a profound and animated discussion in the Committee of Examination and in the commission itself, these three articles were adopted in an amended form with the addition of the provisions concerning railway property, due to the initiative of M. Eyschen of Luxemburg, and submitted to the Conference as Articles 66, 67, 68. If we add to these the three, Articles 64 and 65 the chapter entitled "services rendered by neutrals" consists of five articles, a very small part of a very large field; but small as the project was, it was still further to be reduced, for in the fifth plenary session of the Conference on September 7, 1907, the objections to these articles were so many and so varied that upon motion the entire chapter was referred again to the Second Commission for further consideration and report. Renewed discussion resulted in the definitive acceptance of the article concerning railway property and two *vœux*, the balance of the chapter being rejected.<sup>1</sup> The article concerning railway property, meant originally as an addition to the laws and customs of war, was placed by the small drafting committee in the present convention as its last important article. (Article 19.)

This article like the provisions of Chapter II of the present convention is special in its nature, for it owes its existence to the fact that small States, such as Belgium, and Switzerland, but more particularly Luxemburg, are surrounded by large, powerful and bellicose neighbors. Railway material of the neutral may be found in a neighboring State upon the outbreak of war, and in like manner the railway property of the belligerent may be within the neutral State. It is hardly necessary to remark that property of a neutral should not be retained and used by the belligerent, just as the property of a belligerent should not be retained by the neutral, yet it is embarrassing to

<sup>1</sup> See Vol. II, p. 289.

forbid either party from continuing to use the property merely because war has broken out. Had peace continued the use would be legitimate. The existence of war makes the property more useful to the belligerent. The same may be said in a lesser degree of the neutral. Therefore, the convention lays down the general rule that such property so situated shall not be requisitioned or utilized by a belligerent except when and to the extent absolutely necessary, and that, in case of such use, it shall be returned as soon as possible to the country of origin. On the other hand, it would be unfair to deprive the neutral of the right to retain and utilize at least an equal amount of railway material, property of the belligerent. Such is the stipulation of the convention. But as each power is using property which does not belong to it, it follows that compensation shall be paid by one party or the other in proportion to the material used and to the period of usage. Important as this provision is to countries situated like Belgium, Switzerland and Luxemburg, it is not likely to be of any service to a country like the United States. It may unfortunately be of service in Europe.<sup>1</sup>

<sup>1</sup> For the profound and animated discussion in commission concerning the rights and duties of neutral powers and persons in land warfare, see *La Deuxième Conférence Internationale de la Paix*, 1907, Vol. III, pp. 179-230; 33-88. For the discussions in the plenary sessions of the Conference, see *La Deuxième Conférence Internationale de la Paix*, 1907, *Actes et Documents*, Vol. I, pp. 125-129; 162-164.



## CHAPTER XII

### ENEMY MERCHANT SHIPS AT THE OUTBREAK OF WAR, CONVERSION MERCHANT SHIPS, MARINE MINES, BOMBARDMENT OF UNDEFENDED PORTS

#### 1. THE STATUS OF ENEMY MERCHANT SHIPS AT OUT- BREAK OF HOSTILITIES<sup>1</sup>

When no distinction was made in theory and practice between the status of private property of the enemy upon land and upon sea, it necessarily followed that such property was liable to seizure and confiscation wherever found. If upon land it would naturally fall prey to an invading army and be appropriated to a public use or claimed as the booty of the commander or camp follower. If the private property of the enemy were within the jurisdiction or control of the other belligerent it could easily be confiscated by actual seizure or legislative enactment. The gradual immunity extended to private property of the enemy upon land, reserving always the right to subject it to requisition or to contribution, creates a distinction between the rights of capture and confiscation unless the principle of immunity be equally extended to unoffending private property of the enemy upon the high seas. As the immunity in the latter case, however acceptable in theory, has not been recognized in practice it follows that, whether logical or illogical, the distinction exists and must be borne in mind in discussing the status of the enemy and enemy property.

It may be stated that international law recognizes as a general principle that private property of the enemy upon land

<sup>1</sup> For the proceedings in the Conference on this subject, see *La Deuxième Conférence Internationale de la Paix*, 1907, Vol. III, pp. 825-830, 852-864, 884-886, 917-919, 936-957, 1030-1038, 1150-1155; Vol. I, 235-236, 250-255 (Report of M. Henri Fromageot).

is, within certain limitations, not necessary for the present discussion, exempt from capture and confiscation. It is equally true that private property of the enemy upon the high seas is subject to capture, and the determination of the situation of the property determines at once its liability to or its exemption from capture. An enemy merchant ship is therefore liable to capture if found within the zone of naval operations, unless special rules and regulations exempt it from the treatment recognized and permitted by international law. The situation of the merchant vessel would seem in theory to be unimportant because the right of capture is recognized, but, as a matter of fact, custom, which is the very life of the law, treats differently property situated in an enemy port at the outbreak of hostilities and private property of the enemy upon the high seas. Therefore, it is advisable, in discussing the general subject, to consider, first, the status of enemy merchant vessels found in port upon the breaking out of hostilities, and, second, to discuss the status of enemy merchant vessels found upon the high seas upon the breaking out of war.

If an enemy merchant vessel moored to the wharf or found within the territorial waters of the other belligerent were regarded not only within the jurisdiction of the belligerent but as thoroughly subject to his jurisdiction as other private property of the enemy found upon the land, there could be in theory no rational distinction between the property and the treatment to be accorded to it. Merchant ships of the enemy are not, however, assimilated to private property upon land, but the tendency of custom is to give to them greater rights and privileges than other property found elsewhere upon the outbreak of hostilities. In former times enemy merchant vessels found in the harbor or within the territorial waters were subject to capture, and when hostilities seemed imminent an embargo was placed upon such property so that departure would be illegal and would subject it to seizure or confiscation. The result would be that upon the outbreak of war the property would be seized and passed before a court as legitimate prize. The older law is briefly stated in the case of *Lindo v. Rodney* (1781, Douglas, 615), in which Lord Mansfield said: 4

Ships not knowing of hostilities come in by mistake; upon the declaration of war or hostilities, all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made.

The policy and reasoning by which it was sought to support seizure and confiscation are set forth in the case of the *Boedes Lust* (1803, 5 C. Robinson, 245), tried and condemned before the great Lord Stowell, when Sir William Scott. A Dutch ship on a voyage from Demerara to Batavia, embargoed at the Cape of Good Hope by a British squadron before the actual declaration of war against Holland in 1803, was afterward condemned as enemy's property. In passing judgment Lord Stowell said:

This was the state of the first seizure. It was at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo. That would have been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impressed the hostile character upon the original seizure. It is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus*, by which it was done, that it was done *hostili animo*, and is to be considered as an hostile measure *ab initio*. The property taken is liable to be used as the property of persons, trespassers *ab initio*, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities. No such convention is set up on either side, and the State, by directing proceedings against this property for condemnation, has signified a contrary intention. Accordingly, the general mass of Dutch property has been condemned on this retroactive effect; and this property stands upon the same footing.

However artificial, illogical, or unjust we may consider the reasons advanced by Lord Stowell, the case of the *Boedes Lust* was unquestioned law and actual practice. As late as 1854 Dr. Lushington could say:

With regard to an enemy's property coming to any part of the Kingdom, *or being found there*, being seizable, I confess I am astonished that doubt should exist on the subject. I apprehend

the law has been this, that it is competent for any person to take possession of such property, unless it had any protection by license, or by some declaration emanating by the authority of the Crown, and to assist the Crown to proceed against it to adjudication.<sup>1</sup>

As Professor John Basset Moore says, in his monumental *International Law Digest*:

It was formerly the practice not only to seize enemy vessels in port at the outbreak of war, but also to lay an embargo upon them in expectation of war, so that if war should come they might be confiscated. A rule of precisely the opposite effect has been enforced in recent wars.<sup>2</sup>

The innovation came from a quarter in which it was least expected, for on October 4, 1853, Turkey said, in its declaration of war against Russia:

The Sublime porte does not consider it just that, agreeable to ancient usage, an embargo should be laid upon Russian merchant vessels. Accordingly, they will be warned to proceed within a period to be fixed hereafter to the Black Sea or to the Mediterranean, as they choose.

The Christian governments did not lag behind the followers of Mahomet. The Russian Government granted full liberty to Turkish vessels in its ports to return to their destination till the 10th (22d) of November. On March 27, 1854, France issued the following declaration:

ARTICLE 1. Six weeks from the present date are granted to Russian ships of commerce to quit the ports of France. Those Russian ships which are not actually in our ports, or which may have left the ports of Russia previously to the declaration of war, may enter into French ports and remain there for the completion of their cargoes until the ninth of May, inclusive.

Great Britain issued a similar declaration on March 29, 1854. Further indulgences were afterward allowed to Russian vessels which had sailed for English and French ports prior to May 15, 1854, and Russia on its part allowed English and French vessels six weeks from April 25, 1854, to load their cargoes and

<sup>1</sup> Johanna Emilie, Spinks, 14, (1854.)

<sup>2</sup> Moore, *Digest of Inter. Law*, Vol. VII, sec. 1196, p. 453.



sail from Russian ports in the Black Sea, the Sea of Azof, and the Baltic, and six weeks from the opening of navigation to leave the ports of the White Sea.<sup>1</sup>

We thus see that the right of capture and confiscation was recognized in the Crimean War, but following the initiative of the Turkish Government, the great maritime States of Great Britain, France, and Russia, while recognizing the right, limited it in such a way as to free from capture and confiscation enemy merchant ships found in their respective ports and to give them a certain time within which to unload their cargo and proceed to their ports of destination. Capture is always a harsh measure, but it seems peculiarly harsh to capture and confiscate merchant vessels whose owners did not or could not know of the outbreak of wars and who in no way either directly or remotely influenced or were concerned in the outbreak of war. An enemy vessel found upon the high seas or in an enemy port after such warning or after the various dates prescribed might be treated as having voluntarily assumed the risk of capture, and therefore properly exposed to it. The precedent of 1854 was followed in the Prussian-Austrian War of 1866. For example, the Prussian ministerial declaration, June 21, 1866, provided that:

Austrian merchant vessels which are now in Prussian ports, or whose masters, unaware of the breaking out of the war, may enter Prussian ports, shall, on condition of reciprocity, have six weeks reckoned from the day of their entry into port to land their cargo and to go away with a new cargo, contraband of war excepted. On the expiration of this term they must leave port. Austrian merchant vessels whose masters are aware of the breaking out of the war are not permitted to enter a Prussian port.<sup>2</sup>

In the great war of 1870, France granted a leave of thirty days, as appears from the following passage from a work of authority:

Merchant vessels belonging to the enemy which were actually in the French ports, or which entered the ports in ignorance of the war, were allowed a delay of thirty days for leaving, and

<sup>1</sup> Halleck, *Inter. Law* (3d ed., by Baker), Vol. I, 552, 533, note.

<sup>2</sup> Moore, *Inter. Law Digest*, Vol. VII, sec. 1196, p. 454.

safe-conducts were given them to return to their port of dispatch or of destination. Vessels which took in cargoes for France, or on French account, in enemies or neutral ports before the declaration of war, were not subject to capture, but were allowed to disembark their freights in the French ports, and afterwards received safe-conducts to return to their ports of dispatch.<sup>1</sup>

These European precedents were followed by the United States in the Spanish-American War of 1898. In the President's proclamation, dated April 25, 1898, for the government of the officers of the United States during the war with Spain the fourth rule read as follows:

4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: *Provided*, That nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government.

The Spanish Government issued a royal decree, dated April 23, 1898, which permitted, five days from the date of publication, the departure of American ships from Spanish ports. It was not so liberal as the American proclamation, for the Spanish decree did not in terms prohibit the capture of the American merchantmen after their departure nor did it provide for the entrance and discharge of American ships sailing for Spanish ports before the war. As no captures were made by Spain, the exact nature and extent of the immunity were not tested before a Prize Court. The President's proclamation, however, was passed upon by the courts of the United States, and the interpretation thereof was liberal, in accordance with its spirit. The leading case on the subject is the *Buena Ventura* (1899, 175 U. S., 384). The vessel in question was a Spanish merchant ship captured on the morning of April 22, 1898, some

<sup>1</sup> Halleck, *Inter. Law* (3d ed., by Baker), Vol. I, 532, note.

eight or nine miles off the Florida coast. At the time of capture the vessel was on a voyage from Ship Island, Mississippi, to Rotterdam, by way of Norfolk, Virginia, with a cargo of lumber. She arrived at Ship Island, March 31, 1898, and sailed for Rotterdam, April 19, with a permit, obtained in accordance with the laws of the United States, to call at Norfolk for supply of bunker coal. When captured on April 22 she made no resistance, had on board no military or naval officer, and carried no arms or munitions of war. The question at issue was therefore whether the vessel could be brought within the exemption of the fourth rule of the proclamation of 1898 as to "Spanish merchant vessels, in any ports or places within the United States." In delivering the opinion of the Supreme Court, Mr. Justice Peckham observed, to quote the language of Professor Moore,<sup>1</sup>

that the vessel in question, as a merchant vessel of the enemy carrying on an innocent commercial enterprise at or just prior to the time when hostilities began, belonged to a class which the United States had always desired to treat with great liberality, and which civilized nations had in their later practice in fact so treated. The President's proclamation should therefore receive "the most liberal and extensive interpretation" of which it was capable, and where two or more interpretations were possible the one most favorable to the belligerent in favor of whom the proclamation was issued. The provision that "Spanish merchant vessels in any ports or places within the United States shall be allowed until May 21, 1898, inclusive, for loading their cargoes and departing" might, said the learned justice, be held to include (1) only vessels in port on the day when the proclamation was issued, namely, April 26, or (2) those in port on April 21, the day on which war was declared by Congress to have begun, or (3) not only those then in port, but also any that had sailed therefrom on or before May 21, whether before or after the commencement of the war or the issuing of the proclamation. The court adopted the last interpretation. While the proclamation did not in so many words include vessels which had sailed from the United States before the commencement of the war, such vessels were, said Mr. Justice Peckham, clearly within its "intention," under the liberal construction which the court felt bound to give it. In view of the fact, however, that at the time of the capture, the proclamation of April 26, without

<sup>1</sup> Digest of Inter. Law, Vol. VII, sec. 1196, pp. 455-456.

which the vessel would have been liable to condemnation, had not been issued, restitution was awarded without damages or costs.

The recent Russo-Japanese War likewise followed the enlightened practice dating from the Crimean War. For example, the Imperial Japanese ordinance of February 9, 1904, provided that—

#### ARTICLE 1

Russian merchant ships which happen to be moored in any Japanese port at the time of the issue of the present rules may discharge or load their cargo and leave the country not later than February 16.

#### ARTICLE 2

Russian merchant ships which have left Japan in accordance with the foregoing article and which are provided with a special certificate from the Japanese authorities shall not be captured if they can prove that they are steaming back direct to the nearest Russian port, or a leased port, or to their original destination; this measure shall, however, not apply in case such Russian merchant ships have once touched at a Russian port or a leased port.

And the Imperial Russian order of February 14, 1904, provided that—

Japanese trading vessels which were in Russian ports or havens at the time of the declaration of the war are authorized to remain in such ports before putting out to sea with goods which do not constitute articles of contraband during the delay required in proportion to the cargo of the vessel, but which in any case must not exceed forty-eight hours from the time of the publication of the present declaration by the local authorities.

It is thus seen that in no less than five great wars of the last fifty years an exemption was made in favor of enemy merchant vessels in port at the outbreak of hostilities, and that a longer or shorter period was fixed within which such vessels might safely leave their ports and proceed to their destination. Although the custom is modern, it can not be said to be limited to any particular quarter of the world; for the States generally have recognized the exemption in their recent wars, not only in Europe and America, but also in Asia. Such a custom, however recent it may be, may rightly claim to form a part of



the Law of Nations. It is therefore a source of regret that the Second Peace Conference refused to recognize it as a right but simply as a privilege, a *délai de faveur*, which may be accorded or refused at the option of the belligerent, and that the privilege was unaccompanied by any recommendation of a period of time within which the privilege in question should be accorded. The exact wording of the first two articles of the convention follows:

#### ARTICLE 1

When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

#### ARTICLE 2

A merchant ship unable, owing to circumstances of *force majeure*, to leave the enemy port within the period contemplated in the above article, or which was not allowed to leave, can not be confiscated.

The belligerent may only detain it, without payment or compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.

It may be said that the expression "it is desirable" that the vessels should be allowed to depart freely amounts in reality to a command, and that the practice of the future will recognize the custom as freely as it has done in the past, thus establishing as a right what the Conference modestly denominates a privilege. If such be the case, the opposition of Great Britain to the recognition of the right will be as futile in practice as it was unreasonable at the Conference.

Passing to the second branch of the question, namely, the treatment accorded to enemy merchant ships which prior to the outbreak of war had left port destined to any port or place of the other belligerent, the enlightened policy of the European States in their recent wars of 1854, 1866 and 1870 has been

stated in the extracts already quoted from their respective declarations. The more recent practice will be briefly set forth. The fifth rule of the Presidential proclamation of April 26, 1898, provided that:

Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States shall be permitted to enter such port or place, and to discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

It has previously been observed that the Spanish decree did not provide for the entrance and discharge of American ships sailing for Spanish ports before the war, but, as no captures were made by Spain, the less liberal provisions of the Spanish decree did not affect American commerce. Rule 5 of the American proclamation was judicially interpreted in the case of the *Pedro* (175 U. S., 354). This vessel, sailing under the Spanish flag and officered and manned by Spaniards, was loaded in Antwerp for Cuba, and on March 18, 1898, was chartered by an American firm to proceed to Pensacola, Florida, or Ship Island, Mississippi, for a cargo of lumber for Rotterdam or Antwerp. Shortly after this date the *Pedro* sailed from Antwerp with a cargo of merchandise for Havana and Cienfuegos. She arrived at Havana on April 17 and, after discharging her cargo, sailed on the 22d for Santiago, Cuba, with a small quantity of general merchandise taken at Havana. While pursuing the voyage from Havana to Santiago, Cuba, she was captured on the same day, April 22, a few miles from Havana by the United States blockading fleet. In delivering the opinion of the Supreme Court, Chief Justice Fuller held that the *Pedro* did not fall within the exemption contained in rule 5; that she lay at Havana from the 17th of April to the 22d; that she cleared from Havana April 22, a day after the war began; that she had then no cargo for any port of the United States, but only for an enemy port, namely, Santiago and Cienfuegos. It could not therefore be said that she had

left a foreign port in ignorance of the "perilous condition of affairs;" that it must be assumed that she either knew of hostilities or had been advised that hostilities were imminent. She was not bringing a cargo to the United States for the increase of its resources and the convenience of its citizens, but she was an enemy vessel trading with an enemy port. The Supreme Court therefore affirmed the condemnation of the District Court, and held squarely that the contract to proceed ultimately to a port of the United States did not bring the vessel within the exemption of the fifth rule. The decision of the Supreme Court is technically correct, but it seems illiberal both in its interpretation and application of the exemption meant to be conferred by the fifth rule, as was pointed out by Mr. Justice White in a strong dissenting opinion, in which Justices Brewer, Shiras and Peckham concurred. While it is true that a statute in derogation of the common law should be strictly construed, this principle clearly should not apply to an exception in the common law of nations made in the interest of innocent enemy subjects engaged in innocent commerce.

In the recent Russo-Japanese War an immunity of a like nature was extended by Article 3 of the Imperial Japanese ordinance of February 9, 1904, the exact text of which is as follows:

Russian steamers which may have left for a Japanese port before February 16 may enter our ports, discharge their cargoes at once, and leave the country. The Russian steamers coming under the above category shall be treated in accordance with Article 2.<sup>1</sup>

It will be seen, therefore, that recent enlightened practice permits enemy merchant ships which have left their last port of departure before the commencement of the war, or within a certain fixed period, to continue their journey unmolested to the port or place within the territory of the other belligerent, to unload their cargoes and to return to the home port without danger of capture during the voyage. The convention con-

<sup>1</sup> Quoted at p. 562.

cerning the status of enemy merchant ships unfortunately is less liberal than recent practice. Article 3 is as follows:

Enemy merchant ships which left their last port of departure before the commencement of the war and are encountered on the high seas while still ignorant of the outbreak of hostilities can not be confiscated. They are only liable to detention on the understanding that they shall be restored after the war without compensation, or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board, as well as the security of the ship's papers.

After touching at a port in their own country, or at a neutral port, these ships are subject to the laws and customs of maritime war.

The seeming exemption is rather illusory, for the exemption from capture is based upon the fact that at the time of seizure the enemy merchant ships were still ignorant of the outbreak of hostilities. If they had been informed of the existence of hostilities they would seem to be liable to capture, for the merchant vessels of today have discarded canvas for steam, and it rarely happens that a vessel is provided on the outbound voyage with sufficient coal for the return. It would seem, therefore, that the vessel is exposed to capture, because it could not safely continue its voyage to the belligerent port, and, if it seeks to return to the home port, the vessel is liable to capture, with little chance of escape by reason of the lack of means to continue its voyage. If the merchant vessel is ignorant of the outbreak of hostilities it may not be captured, but it may be detained subject to restoration at the end of the war without compensation. The value of the vessel may be seriously depreciated in case of a long war. If requisitioned, it is unlikely that the transaction will be profitable to the original owner, and if destroyed it is improbable that the compensation will at all be adequate. The article in question, therefore, can not be considered an advance; it is a distinct limitation of customary rights. Article 4 of the convention is as follows:

Enemy cargo on board the vessels referred to in Articles 1 and 2 is likewise liable to be detained and restored after the termination of the war without payment of compensation, or to be requisitioned on payment of compensation, with or without the ship.



The same rule applies in the case of cargo on board the vessels referred to in Article 3.

The provisions depending upon Articles 1 and 3, already quoted, would seem to require no special explanation or comment.

The convention as a whole was a compromise between those who believed in the existence of a right and those who refused to recognize the legal validity of the custom which has grown up in recent years. As in most compromises the result is unsatisfactory. The convention can not be called progressive, for it questions a custom which seems generally established and its adoption would seem to sanction less liberal and enlightened practice. The United States delegation therefore refused to sign the convention and its acceptance has not been recommended by the Department of State.

## 2. THE CONVERSION OF MERCHANTMEN INTO WARSHIPS<sup>1</sup>

The first question on the program of the Fourth Commission of the Second Conference was the transformation of merchant vessels into warships, a subject of present interest owing to unexpected incidents of the recent Russo-Japanese war in the extreme orient. Before the declaration of Paris of 1856 the fighting force of an enemy upon the sea consisted, first, of public armed vessels subject only to the control of the government in whose employ they were; second, privateers, that is to say, vessels owned by adventurers, provided with a commission to seize and by the decision of a court of prize acquire title to enemy property captured by them upon the high seas. The motive of the first class was to destroy the fighting force of the enemy, and, at the same time, by reaching private property to destroy its means of resistance and thus bring it to terms. The object of the privateer was private gain, for, disguise the fact as we will, the privateer was an adventurer little better than a buccaneer, permitted to prey upon

<sup>1</sup> See *La Deuxième Conférence Internationale de la Paix* (1907) Vol. III, pp. 744-746, 813-825, 846-850, 916-917, 930-936, 1004-1014, 1023-1024, 1038-1040, 1078-1082, 1135-1140; Vol. I, 235, 239-245 (Report of M. Henri Fromageot).

enemy commerce at his own risk for his own profit. Incidentally the capture of private property of the enemy might, theoretically, at least, shorten the war. The man-of-war is subjected to naval discipline with ample power to punish violations of the laws of war. The privateer, on the other hand, although subject to control in theory, was in practice its own master, with the result that abuses grew up and were tolerated provided only they enhanced profit. Recognizing the evils of the system of privateering and the further fact that war is in reality a hostile relation between State and State to be prosecuted solely by agents of the government, the system of privateering was abolished by the Declaration of Paris of 1856, in express terms—"Privateering is and remains abolished"—to which declaration the civilized States have adhered with the exception of the United States. The terms of the Declaration are really important, because privateering is not merely abolished: it is to remain abolished, the intention of the declaration clearly being that the system begotten in greed, and nurtured in fraud, should be an outlaw in the future.

The introduction of steam, with the consequent disappearance of sailing craft, the appearance of the iron-clad and the immense fighting strength of the modern man-of-war produced, it should be said, by a corresponding expense, have made it impossible for private parties to indulge in privateering even if the law permitted it. But the demands of the modern man-of-war are very great. It cannot carry its coal as Lord Nelson carried his canvas, so that it is important to supply the modern fleet with transports and light craft either for the support of the fleet or for the performance of minor services. There is danger, however, that this auxiliary craft may be the privateersman in disguise, because for the performances of these lighter duties, merchant vessels are taken into service and indeed the larger steamships are built with a view to the possibility of eventual use in time of war.

The transformation of merchant vessels into men-of-war is clearly legitimate as long as war is a recognized system; for if a nation may build a vessel for warlike purposes it clearly can convert a merchantman into a man-of-war. It is at once a

question of national sovereignty and expediency. But it is important to determine the conditions under which the transformation may take place. Shall it take place in time of peace, although in anticipation of war, or may it take place after the declaration of war? It would seem that each query should be answered in the affirmative. A more difficult question is the determination of the locality in which the transformation may be effected. If the transformation is to be permitted, it follows without argument that it may take place anywhere within the territorial waters of the transforming State as well as within territory occupied by it or subject to its exclusive jurisdiction. It is more difficult to determine whether the conversion should be permitted upon the high seas. From one point of view this should be permissible, because the high seas are not subject to the exclusive control of any nation, and a merchantman upon the high seas is by international law under the exclusive control of the nation whose flag it flies. But this is the argument of the belligerent who stands upon the extreme letter of his right in forgetfulness or disregard of neutral rights. As a man-of-war possesses the right to search neutral vessels suspected of unneutral conduct, whether such vessel carry contraband or be destined to a blockaded port, it follows that the neutral has a right to know the extent of the belligerent fleet, and that it shall not be exposed to the visit and search of a merchantman upon the high seas, which has assumed the character of a man-of-war for the purpose of visit and search and which may renounce this character immediately after the search or at its pleasure.

This latter illustration, no mere supposition, was a picturesque practice of Russia in its recent war with Japan.<sup>1</sup> Shall the transformation when effected be for the duration of the war, or shall the vesselameleon-like be permitted to change its nature either upon the command of its government or when the necessities of the case seem to suggest it? It would seem

<sup>1</sup> See Lawrence's *War and Neutrality in the Far East* (2d ed.) pp. 205-208, 212-214; Hershey's *International Law and Diplomacy of the Russo-Japanese War*, pp. 138-142, 151-153.

reasonable to insist that the transformation if effected should be permanent, at least for the duration of the war. Finally, the transformed vessel should be commissioned as a man-of-war, subjected to naval discipline and enumerated among the naval forces of the belligerent.

The difficulties of the situation require definition lest insensibly the evils of privateering reappear. The question arose during the Franco-German War of 1870 when in August of that year Prussia ordered the creation of a volunteer navy.

The owners of vessels were invited to fit them out for attack on French ships of war, and large premiums for the destruction of any of the latter were offered. The crews of vessels belonging to the volunteer navy were to be under naval discipline, but they were to be furnished by the owners of the ships; the officers were to be merchant seamen, wearing the same uniform as naval officers, and provided with temporary commissions, but not forming part of, or attached to, the navy in any way, though capable of receiving a commission in it as a reward for exceptional services; the vessels were to sail under the flag of the North German navy.<sup>1</sup>

It is a matter of dispute whether the Prussian volunteer navy was not a violation of the spirit if not of the letter of the Declaration of Paris, for the declaration clearly meant not merely to eliminate the privateer but the use of other than national property under the command of responsible officers of the government in the conduct of naval war. To invoke again the great authority of Mr. Hall:

The incorporation of a part of the merchant marine of a country in its regular navy is of course to be distinguished from such a measure as that above discussed. A marked instance of incorporation is supplied by the Russian volunteer fleet. The vessels are built at private cost, and in time of peace they carry the mercantile flag of their country; but their captain and at least one other officer hold commissions from their sovereign, they are under naval discipline, and they appear to be employed solely in public services, such as the conveyance of convicts to the Russian possessions on the Pacific. Taking the circumstances as a whole, it is difficult to regard the use of the mercantile flag as serious; they are not merely vessels which in the event of war can be instantaneously converted into public vessels of

<sup>1</sup> Hall's International Law (5th ed.), p. 527.



the State, they are properly to be considered as already belonging to the imperial navy. The position of vessels belonging to the great French mail lines is different. They are commanded by a commissioned officer of the navy, but so long as peace lasts their employment is genuinely private and commercial; means is simply provided by which they can be placed under naval discipline and turned into vessels of war as soon as an emergency arises. They are not now incorporated in the French navy, but incorporation would take place on the outbreak of hostilities. [The liners which of recent years have been subsidized by the British Government in return for a lien on their services as cruisers in time of war, stand on a similar footing, except that in peace time they are not under the command of an officer in the Royal navy.]<sup>1</sup>

Nations look upon merchant marine very much in the way that the militia is considered, although the analogy is imperfect, because the militia is organized for service in future war, whereas the merchant marine is primarily pacific. However, it seems to be beyond controversy that nations will in the future press merchant ships into naval service, and it is therefore a matter of importance to determine the exact status of the auxiliary fleet. It is a subject of sincere regret that the convention drafted and adopted by the Conference covers but a small part of the subject.

The convention, however, was an honest endeavor and its preamble is honest; for it states it to be desirable

in view of the incorporation in time of war of merchant ships in the fighting fleet, to define the conditions subject to which this operation may be effected;

and in the next place it confesses its limitations, stating frankly that:

whereas, however, the Contracting Powers have been unable to come to an agreement on the question whether the conversion of a merchant ship into a warship may take place on the high seas, it is understood that the question of the place where such conversion is effected remains outside the scope of this agreement, and is in no way affected by the following rules.

The convention thereupon assumes the right to convert

<sup>1</sup>Ibid. 529. The passage in brackets is an addition of J. B. Atlay, the editor of the fifth edition.

merchant ships into men-of-war and regulates and controls its exercise. For example, Article 1 provides that a merchant ship in order to be considered a man-of-war must be placed

under the direct authority, immediate control, and responsibility of the power whose flag it flies.

As was said by M. Fromageot, the learned reporter of the Fourth Commission:

The first article presents a principle which is, so to speak, the corollary of the Declaration of Paris, and has for its object to give every guarantee against a return more or less disguised to privateering.<sup>1</sup>

The next article provides, and very properly, that the converted ship must bear the outward and distinguishing appearance of a man-of-war of its nationality. (Article 2.) The first article thus determines the validity of the transformation as a matter of law whereby to tax the government with responsibility. The second paragraph is conceived, not merely in the interest of the belligerent but primarily in the interest of the neutral, so that the character of the vessel may be evident at a distance by its outward appearance.

But it is not sufficient that the vessel be transformed and that it bear external marks of such transformation. The commander should be in the service of the State and duly commissioned by competent authorities; his name should appear in the list of officers of the fighting fleet (Article 3); the crew should be subject to military discipline (Article 4); and the converted ship should observe in all its operations the laws and customs of war (Article 5). The reality and good faith of the transformation are thus assured by subjecting the vessel to the control of a naval officer and the crew to military discipline. The requirement that the converted vessel observe the laws and customs of war is a guarantee against the relapse into the barbarism of privateering. The American naval delegate, Admiral Sperry, objected to the last requirement and proposed to suppress the article as unnecessary and as constituting in

<sup>1</sup> Report of M. Henri Fromageot, *La Deuxième Conférence Internationale de la Paix* (1907), *Actes et Documents*, Vol. I, p. 244.

his opinion an embarrassing distinction for certain merchant vessels acquired and regularly commissioned by the United States in time of peace as a part of its fleet. Admiral Sperry's motion was opposed by Dr. Lammasch for the reason that the suppression of Article 5 would constitute an embarrassing distinction between transformed vessels on the one hand and war vessels on the other. The article as framed was adopted subject to the reserve of Admiral Sperry.<sup>1</sup>

Article 6, the last article of the convention requiring consideration, provides that the belligerent should as soon as possible register the converted vessel in its list of warships, thus assuring the publicity of the transformation. It is hardly necessary to add that the article is in the interest of the neutral.

The learned reporter of the convention stated it to be a corollary to the Declaration of Paris abolishing privateering. This fact was recognized by the American delegation and General Porter on its behalf stated,

It is evident that the propositions . . . have for their principal object the reiteration of the declaration of Paris relating to the abolition of privateering. It is well known that the government of the United States of America has not adhered to this declaration solely for the reason that the declaration did not recognize the inviolability of private property of the enemy at sea. For this reason the propositions submitted present questions solely for the consideration of the signatories of the Declaration of Paris, and in consequence thereof our delegation must, for the moment, decline to take part in the discussion and abstain from voting. If, however, the Conference by its action, shall establish the inviolability of private property at sea, this delegation will be happy to vote for the abolition of privateering.<sup>2</sup>

The American delegation abstained on the final vote taken for the reason advanced by General Porter.

The convention was not accepted by the American delegation at The Hague, nor was it submitted to the Senate for

<sup>1</sup> La Deuxième Conférence Internationale de la Paix (1907), Vol. III, Fourth Commission, Comité d'Examen, 12th Session, p. 1040.

<sup>2</sup> Ibid., Fourth Commission, 13th Session, pp. 916-917.

approval. It cannot be denied that the convention as adopted, limited solely to signatory powers (Article 7), is very modest and of slight practical value, because the question is not whether transformation be permitted, but the determination of the locality and conditions under which it may be permissible. The convention is at best but evidence of transformation. It consciously excludes vital questions and by so doing sacrifices substance to form. For example, in the recent Russo-Japanese War two vessels, the *Peterburg* and *Smolensk*, passed the Dardanelles, flying the commercial flag, declaring that they were merchant ships and maintaining such character en route through the Suez Canal. Upon entering the Red Sea guns were brought out of the hold and mounted, the armament was soon completed, the vessels assumed the character of warships, proceeded to cruise against and prey upon neutral commerce. The action of Russia was questionable from two points of view, first because the Convention of March 31, 1856, and the treaty signed at London on March 3, 1871, closed the Dardanelles and Bosphorus to men-of-war. If the Russian vessels were men-of-war they had no right to pass the Bosphorus and the Dardanelles; if they were merchantmen they had no right to visit and search, to seize and prey upon commerce, whether belligerent or neutral. If the vessels improperly passed the Bosphorus and Dardanelles, they committed a wrong and on familiar doctrine should not be permitted to take advantage of their own wrong. In the next place, supposing they were merchant vessels, they could not exercise belligerent rights unless commanded as war vessels without violating the letter as well as the spirit of the Declaration of Paris. The important and difficult question arises whether merchant vessels may be transformed into men-of-war upon the high seas, a question which the Conference left undecided. The matter, however, was discussed, and Great Britain, Japan, Holland and the United States proposed that transformation should only be permitted within a national or occupied port. Italy accepted this view, but proposed an exception in favor of vessels upon the high seas at the declaration of war. Ger-



many, Russia and France maintained on the contrary the right of transformation even upon the high seas.<sup>1</sup>

In the presence of such opposing views the Conference was forced to adjourn consideration of the matter. Again, it will be noted that the convention does not state that the transformation may not be subject to retransformation during the course of one and the same war, and if the right exist the frequency of its exercise is a matter of expediency. Austria-Hungary proposed that the transformation once made should last during the continuance of the war, but the Conference was likewise unable to agree upon this question and it was deferred. The importance therefore of the convention is very slight; for in simplest terms, disregarding the language of the preamble and provisions of the articles, it means simply that men-of-war are men-of-war, and that merchant vessels as such are not to be considered as men-of-war.

### 3. THE LAYING OF AUTOMATIC SUBMARINE CONTACT MINES<sup>2</sup>

The Chinese Government is obliged even today to furnish coasting vessels with special instruments to catch and destroy floating mines, which obstruct not only the high seas but Chinese territorial waters. Notwithstanding all the precautions taken, a very considerable number of coasting vessels, fishing smacks, junks, and sampans, have been sunk by contact with these automatic submarine mines. And these vessels have been swallowed up and so completely lost to sight that details of these disasters have not reached the western world. It is estimated that from 500 to 600 of our subjects who followed their peaceful pursuits have thus met a cruel death on account of these agents of destruction.<sup>3</sup>

Such was the language of a Chinese delegate at The Hague Conference of 1907 regarding the after-effects of a war supposedly between Russia and Japan.

<sup>1</sup> On a vote taken in the Committee of Examination nine States voted to forbid transformation upon the high seas—United States, Belgium, Brazil, Great Britain, Italy, Japan, Norway, Holland, Sweden—to seven in favor of it—Germany, Austria-Hungary, Argentine, Chile, France, Russia, Servia.

<sup>2</sup> For a résumé of the discussion in the Conference on this difficult question see the admirable reports of Professor George Streit, in *La Deuxième Conférence Internationale de la Paix*, (1907) Vol. III, pp. 397-426, 455-459; for final proceedings in plenary session, see Vol. I, pp. 278-282.

<sup>3</sup> Declaration of the Chinese Delegation, *La Deuxième Conférence Internationale de la Paix*, 1907, Vol. III, p. 663.

The world was so large, it is now so very little! The world is so closely knit together that a disturbance in one part is sure to be felt in the other, just as a pebble dropped in a pool sends a ripple to either bank. The effect of war cannot, therefore, be limited solely to belligerents, the neutral is injured in his property, and as in the war between Russia and Japan, in his person. The rights of neutrals have imposed duties upon belligerents, and it may be that a sense of international oneness will eventually not only limit warfare but bind its members over to keep the peace. As long as warfare is permitted, however, its effects should be confined as far as possible to the immediate belligerents, and if the effects of certain means of destruction cannot be confined to belligerents, there seems no reason why the interests of two jarring members of the family of nations should not yield to the interests of all.

As regards the particular means of destruction dealt with in the present convention, it may be said that mines are not new; that they came into use with gunpowder; that they were successfully used at sea in the American Civil War, by means of which harbors were defended and blockading ships attacked and destroyed. This, however, was a mine placed within territorial waters, and there can be no doubt that, as long as war is recognized, States may protect themselves within their territorial waters by all means, provided only that the means of destruction intended for the enemy do not break loose from control and endanger neutral life and property beyond the limits of territorial jurisdiction. Therefore, mines may freely be placed in ports and harbors, or in territorial waters generally to be exploded by contact or controlled from the shore. The difficulty, however, arises when belligerents set in motion an agency whose effect is not limited to its territorial waters, or if in battle on the high seas, the destructive power of the means employed survives the battle. It may be said that submarine mines which are floating, either anchored or drifting, and whose explosion is caused automatically by contact are newcomers in modern warfare, and that, therefore, there is by reason of their novelty difficulty in their regulation. If, how-

ever, we bear in mind that the Law of Nations permits the appropriation of contiguous waters for a distance of three miles from low-water mark, and if we further admit, as we must, that the high seas are not susceptible of appropriation but are the highway alike for belligerent or neutral, although the belligerent is permitted for the purpose of battle to control a limited sphere, we are forced to the conclusion that the interest of the belligerent, being special and temporary, should not displace or control the interest of the neutral, which is general and permanent. The application of these general principles to a new but concrete problem necessarily and logically solves it. As the great Lord Stowell said in the case of the *Atlanta* (6 C. Robinson, 440, 459):

If the court took upon itself to assume principles in themselves novel, it might justly incur such an imputation; but to apply established principles to new cases, cannot surely be so considered. All law of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not new, nor is it justly chargeable with being an innovation on the ancient law; when, in fact, the court does nothing more than apply old principles to new circumstances.

We are now prepared to examine the various articles of the convention relating to the laying of automatic submarine contact mines. As in the case of the transformation of merchant ships into men-of-war, the preamble of the present convention recognizes the imperfect and tentative nature of the convention, but commends its enforcement "until such time as it is found possible to formulate rules on the subject which shall insure to the interests involved all the guarantees desirable." The principles, however, proclaimed in the preamble are correct and deserve unstinted praise and universal acceptance. For example, the Conference declares itself as "inspired by the principle of freedom of sea routes, the common highways of all nations." It concedes that the existing position of affairs makes it impossible to forbid the employment of automatic submarine contact mines, but considers it nevertheless desirable "to restrict and regulate their employment," assuredly a

very commendable purpose, "in order to mitigate the severity of war and to insure, as far as possible, to peaceful navigation the security to which it is entitled, despite the existence of war." It might be said that the impossibility of forbidding the employment of automatic submarine contact mines is not so self-evident as the wisdom and necessity of their regulation. The Conference of 1899 owed its existence, it would seem, to the desire to check armament and the increasing burden of military expenditures, and had the States represented been willing to limit themselves to the known means of destruction this convention concerning mines would have been unnecessary. Nations seem, however, unwilling to fetter the inventive genius of their people when from its encouragement new and destructive means of warfare are to be expected. An examination of the proceedings of the First Conference shows that the small States were as unwilling to put up with imperfect arms as the larger States were unwilling to limit themselves to the means actually known and in use. Had they agreed to leave matters in status quo for a period of years, relative equality or inequality would have been maintained. Had the nations assembled in 1907 at The Hague forbidden the use of floating mines outward equality would have been observed. Mines are, however, said to be an efficient and comparatively inexpensive means of protecting the coast, whether to ward off the enemy, to resist or raise a blockade. For these reasons Powers with large navies are said not to favor mines, even for their coast defenses, because mines not only prevent free and unrestricted access to the enemy coast but render a return to the home port in stress of weather dangerous. It is stated by a competent authority, Admiral Charles H. Stockton of the United States Navy, that,

Great Britain has practically abandoned the use of submarine mines for the defense of its ports and is trusting to protected automobile torpedoes of the Whitehead and other types in connection with submarine boats for the defense of its seaports. Hence, and in connection with this, the fact that her fleet both naval and maritime, is the greatest in the world—



never greater or more efficient than now—this power represents the extreme school against the use of submarine mines exploded by contact.<sup>1</sup>

Admitting this statement to be correct, for the layman must perforce accept the verdict of the specialist, it would follow that the prohibition of such mines might work an inequality, because the renunciation would deprive the smaller States with moderate navies, of the means of resisting the powerful fleets. It is not meant, however, to suggest even indirectly that British opposition to the use of mines is due to the possession of a matchless and overwhelming fleet, because fleets are able to pick up and explode mines without great danger, although it may be at considerable delay. Undoubtedly Great Britain opposed for humanitarian reasons, sowing the high seas with mines. Material interests were not lacking, for British commerce extending over the world is most likely to be injured by drifting mines. The horror of a means of destruction is perhaps more evident when opposed to our interests. Given the advantage, however, of the use of mines, it is at once seen why the Second Conference did not prohibit their use.

The first article, while admitting the use of mines, seeks to limit their destructiveness to the belligerents and to the locality in which they are placed. It also recognizes two kinds of automatic contact mines at present in use, namely, the unanchored and anchored variety and established a principle which if followed will protect neutral commerce. The article does not deal with the mines placed in territorial waters under control from shore. It deals with the unanchored and anchored mines which explode automatically by contact. In the first place, it is forbidden to use unanchored automatic contact mines except when so constructed as to become harmless one hour at most after control over them is abandoned. In the next place, it is forbidden specifically to lay anchored automatic contact mines which do not become harmless upon breaking loose from their moorings.

<sup>1</sup> American Journal of International Law (1908), Vol. II. p. 279.

And, finally, it is forbidden to use torpedoes which do not become harmless when they have missed their mark.

The British delegation proposed that unanchored submarine mines exploded automatically by contact should be forbidden, a proposition supported by the United States. The Conference, however, while willing to prevent the use of unanchored mines dangerous to commerce, was unwilling to renounce the use of such mines if in reality controllable. The sentiment was so strongly in favor of this view, championed by Italy, that the British delegation yielded the point, provided only that the mines should lose their destructive force within a very short lapse of time after the loss of control. The period of an hour was eventually agreed upon. In criticism of this compromise, it may be said that many experiments must needs be made and perhaps many a life sacrificed before it be ascertained whether a particular form of mine loses its destructiveness within the prescribed period. It clearly would have been better to forbid the use of such mines during a fixed period, for example, five years, as proposed by Germany, in order that a subsequent conference might, in the light of experience, permit under proper restrictions or forbid entirely their use, in view of the doubt and uncertainty expressed at the Conference.

The provision concerning anchored automatic contact mines is beyond criticism, for it forbids their employment unless they become harmless "as soon as they have broken loose from their moorings." It may well be that human life will be sacrificed in the interest of science, but the presumption is in favor of the prohibition as in the matter of unanchored mines it is against inhibition.

The first article therefore recognizes a twofold division of contact mines and regulates in general the use to be made of each.

The second article forbids the laying of contact mines off the coast and ports of the enemy with the sole object of intercepting commerce, an article which in its present form is as acceptable as it is reasonable. It was, however, objected to

on the ground that the word "sole" introduced a subjective element by which the inhibition might be evaded, because to violate the letter of the article the mines must be used with the sole object of intercepting commercial shipping. If placed for any other reason the spirit would be violated but the letter would be saved intact. For this reason Germany and France considered the article objectionable.

It will be noted, that the article although it may refer to does not specify blockade. As proposed by Great Britain the "use of floating contact mines to establish or maintain a commercial blockade should be forbidden." Doubt as to the effect of this article upon the effectiveness of blockade led to its present form in which, however, the difficulty is rather adjourned than met, because the Declaration of Paris of 1856, contemplates effectiveness of the blockade to be produced by vessels. It will be noted, also, that the article refers to the locality in which the mines may be placed, and it is interesting to observe that four articles (2-5) referring to locality prepared by the Committee of Examination and proposed to the commission find no place in the convention.<sup>1</sup> Briefly considered these articles were divisible into three groups, the first group consisting of Articles 2 and 3 regarding the defensive use of mines, the second group consisting of Article 4 regulating the use of mines for purposes of attack, and the third group consisting of Article 5 permitting the use of mines to belligerents in the sphere of their immediate activity. In summary form, it was forbidden to place anchored mines beyond the three-mile limit; although in the case of bays the limit of three miles was to be measured from a straight line drawn across the bay at the nearest point to the entrance where the width of the bay does not exceed ten miles. (Article 2.) In the case of fortified harbors and military arsenals, anchored mines might be placed for a distance of ten miles. (Article 3.) As previously stated these Articles 2 and 3 of the original project regulated the use of mines for defensive purposes. The powers generally

<sup>1</sup> For full text of project reported to the Third Commission, see Appendix, pp. 829-831.

were unwilling to limit themselves by treaty to such a use of mines and the articles in question were stricken in commission. Article 4, confining mines for purposes of attack within the same limits with the exception of fortified harbors and state arsenals, met a like fate. The third and concluding paragraph of this fourth article dealing with the interception of neutral commerce, was saved from the general wreck and appears in separate form as Article 2 of the convention. Article 5 of the original project gave belligerents the right to use mines in the sphere of their immediate activity, provided, however, that the mines so employed were so constructed as to become harmless in two hours at most after abandonment. This article was stricken in its entirety, so that belligerents may, it would appear, use mines anywhere upon the high seas. Referring to Article 2 of the convention forbidding the employment of mines off shore for the sole purpose of intercepting commerce, it is thus seen that the attempt to confine the use of mines within permitted and determined localities was not crowned with success.

Articles 3 and 4 of the convention refer respectively to the precautions to be taken by belligerents in the matter of anchored and then of neutrals in the matter of all mines. For example, every possible precaution must be taken by belligerents for the security of peaceful shipping, and belligerents specifically undertake to do their utmost to render these mines harmless within a limited time. Should the mines cease to be under surveillance, the belligerents undertake to notify the danger zones as soon as military exigencies permit. It will be noted, that every presumption is in favor of belligerent right, for, although belligerents bind themselves to render the mines harmless within a limited time, they do not need to watch over them. Nor do they need to notify the danger zones at once but as soon as military exigencies permit. If we recall the anecdote of Nelson turning his blind eye to a signal to withdraw, we can hardly expect naval officers in the exultation of victory or the throes of defeat to think of the neutral. Neutral powers are assimilated to belligerents in that



they must observe the same rules and take the same precautions in regard to mines off their coasts as are imposed upon belligerents. (Article 4.) That is, they must inform shipowners in advance where the mines have been laid, which notice must be communicated at once to the Governments through diplomatic channels. It is reasonable to provide in the case of neutrals that the notice be in advance, whereas it might be equally unreasonable to cause belligerents to notify shipowners in advance, because by so doing the purpose of the mine might be defeated.

Article 5 binds the contracting powers to do their utmost at the close of the war to remove the mines laid by them. If, however, mines have been laid by one or other of the belligerents off the enemy's coast it seems excessive to require that each belligerent should remove the mines placed by it. The purpose of the obligation requires that the mines be removed, and upon the notification of the exact situation of the mines, each power should proceed without delay to remove them from its territorial waters. And such is the requirement of the article.

It may happen, however, that Contracting Powers, while addicted to mines, do not possess "the perfected mines of the pattern contemplated in the present convention." In this case the provisions of Articles 1 and 3 are inapplicable. However, in order that the convention may apply generally, the Contracting Powers "undertake to convert the *matériel* of their mines as soon as possible, so as to bring it into conformity with the foregoing requirements." (Article 6.) Article 7 restricts the convention to Contracting Powers, and Article 11 limits the duration of the convention to seven years, with the further proviso in Article 12 that the question of the employment of automatic contact mines be opened six months before the expiration of this period, unless the question of the use of automatic contact mines has been already reconsidered and settled at an earlier date by the Third Peace Conference.

Such is in brief the convention for the laying of submarine automatic contact mines. It is good as far as it goes, but unstinted praise would be as improper as unqualified criticism.

To permit the use of mines upon the high seas may lead to the injury of neutral commerce, which the convention aims to prevent, for it does not appear that unanchored mines will become harmless within so short a period of time after being placed as not to interfere with neutral commerce. Ordinary reason, as well as military necessity, keeps neutrals beyond the sphere of naval action, but mines scattered by either belligerent may survive their immediate purpose to the detriment of neutral life and property. The pathetic appeal of China should not fall on deaf ears, and the convention cannot be looked upon other than as a compromise limited to seven years within which period we hope the world may see no war to test the convention. The note of warning sounded by Sir Ernest Satow on behalf of the British delegation should not fail to awaken an echo in the lover of his kind:

Having voted for the Mines Convention which the Conference has just accepted, the British delegation desires to declare that it cannot regard this arrangement as furnishing a final solution of the question, but only as marking a stage in international legislation on the subject. It does not consider that adequate account has been taken in the convention of the rights of neutrals to protection, or of humanitarian sentiments which cannot be neglected. The British delegation has done its best to bring the Conference to share its views, but its efforts in this directions have remained without result. The high seas, gentlemen, form a great international highway. If in the present state of international laws and customs belligerents are permitted to fight out their quarrels upon the high seas, it is none the less incumbent upon them to do nothing which might, long after their departure from a particular place, render this highway dangerous for neutrals who are equally entitled to use it. We declare without hesitation that the right of the neutral to security of navigation on the high seas ought to come before the transitory right of the belligerent to employ these seas as the scene of the operation of war.

Nevertheless, the convention as adopted imposes upon the belligerent no restriction as to the placing of anchored mines, which consequently may be laid wherever the belligerent chooses, in his own waters for self-defense, in the waters of the enemy as a means of attack, or finally on the high seas, so that neutral navigation will inevitably run great risk in time of naval war and may be exposed to many a disaster. We have already on several occasions insisted upon the danger of a situation of

this kind. We have endeavored to show what would be the effect produced by the loss of a great liner belonging to a neutral power. We did not fail to bring forward every argument in favor of limiting the field of action for these mines, while we called very special attention to the advantages which the civilized world would gain from this restriction, since it would be equivalent to diminishing to a certain extent the causes of war-like conflicts. It appeared to us that by acceptance of the proposal made by us at the beginning of the discussion, dangers would have been obviated which in every maritime war of the future will threaten to disturb friendly relations between neutrals and belligerents. But, since the Conference has not shared our views, it remains for us to declare in the most formal manner that these dangers exist, and that the certainty that they will make themselves felt in the future is due to the incomplete character of the present convention.

As this convention, in our opinion, constitutes only a partial and inadequate solution of the problem, it cannot, as has already been pointed out, be regarded as a complete exposition of international law on this subject. Accordingly, it will not be permissible to presume the legitimacy of an action for the mere reason that this convention has not prohibited it. This is a principle which we desired to affirm, and which it will be impossible for any State to ignore, whatever its power.<sup>1</sup>

Baron Marschall von Bieberstein replied to Sir Ernest as follows:

That a belligerent who lays mines assumes a very heavy responsibility towards neutrals and towards peaceful shipping is a point on which we are all agreed. No one will resort to this instrument of warfare unless for military reasons of an absolutely urgent character. But military acts are not solely governed by stipulations of international law. There are other facts. Conscience, good sense, and the sense of duty imposed by principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German navy, I loudly proclaim it (*je le dis à haute voix*), will always fulfill in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization. I have no need to tell you that I entirely recognize the importance of the codification of rules to be followed in war. But it would be a great mistake to issue rules the strict observation of which might be rendered impossible by the law of facts. It is of the first importance

<sup>1</sup> *Courrier de la Conférence*, No. 100: translation as in the *Times* of tenth October, 1907; quoted from Westlake, *International Law*, Vol. II, p. 324.

that the international maritime law which we desire to create should only contain clauses the execution of which is possible from a military point of view—is possible even in exceptional circumstances. Otherwise the respect for law would be lessened and its authority undermined. It would also seem to us to be preferable to maintain at present a certain reserve, in the expectation that seven years hence it will be easier to find a solution which will be acceptable to the whole world. As to the humanitarian sentiments of which the British delegate has spoken, I cannot admit that there is any country in the world which is superior to my country or my Government in the sentiment of humanity.<sup>1</sup>

#### 4. BOMBARDMENT OF UNDEFENDED PORTS BY NAVAL FORCES<sup>2</sup>

Among the six *vœux* to be found in the Final Act of the First Hague Peace Conference is the following wish:

The Conference expresses the wish that the proposal to settle the question of the bombardment of ports, towns and villages by a naval force may be referred to a subsequent conference for consideration.

This recommendation did not fall upon deaf ears, and among the most admirable results of the Second Peace Conference is the small but simple convention forbidding the bombardment of undefended ports, towns, villages, dwellings, or buildings. This is not the appropriate place to discuss the relation between a recommendation of one conference and the work of a succeeding one, but it is pleasing to note that the recommendation of a conference is not a burial; that it calls attention of the powers to the subject-matter and thus paves the way for a substantial agreement at the conference to which the recommendation is referred. If the recommendations of the Second Conference fare as well as the recommendation of the First Conference regarding bombardment, the world will be the gainer and the cause of international justice, and therefore of peace, will be much advanced by the Third Conference, which is gradually becoming the center of hope and expectation.

<sup>1</sup> Times of tenth October, 1907; quoted by Westlake, *International Law*, Vol. II, p. 325.

<sup>2</sup> For a résumé of the discussions in the Conference on this subject see the Report of Professor George Streit in *La Deuxième Conférence Internationale de la Paix* (1907) Vol. I, pp. 111-118.



The purpose of war is to bring the enemy to terms, and all means calculated to attain this desirable end are legitimate, provided they do not cause needless suffering and are not in their nature more brutal than war must always be. The noncombatant is regarded merely as a prospective enemy, to be looked upon with suspicion, but not to be subjected to the pains and penalties of the soldier in the field. Public property may indeed be appropriated; private property may be destroyed for a military purpose, may be requisitioned, or may be subjected to contribution, but it is no longer at the mercy of an enemy or invader. A fortress may be assaulted, but the garrison is no longer put to the sword for a refusal to surrender. A fortified town may be taken by storm, but the noncombatant and his property must be spared, as far as possible. Article 25 of the regulations respecting the laws and customs of war on land adopted at the First Hague Conference provides that the "attack or bombardment of towns, villages, habitations, or buildings which are not defended is prohibited." The enemy, his means of attack and defense, may be reduced by force. The defenseless, whether they be noncombatants or merely property, are no longer exposed to attack or destruction. It is true that this article and its salutary prohibition applies to land warfare, and the attempt to extend it to naval warfare failed for the moment because Great Britain was unwilling to extend the discussion beyond the immediate program, namely, the codification of the laws and customs of warfare on land. Hence the reference to a subsequent conference. There is, however, no reason why a different rule should prevail in naval warfare, and that nonoffending and defenseless towns, villages, or habitations should be destroyed merely because the assailant is able to do so. Devastation in land warfare has not produced peace. It has, on the contrary, prolonged war and created an animosity which survives the war in which it occurred. It is not only brutal but useless as well. As long ago as 1694 Evelyn said:

Lord Berkeley burnt Dieppe and Havre in revenge for the defeat at Brest. This manner of destructive war was begun

by the French, and is exceedingly ruinous, especially falling on the poorer people, and does not seem to tend to make a more speedy end of the war, but rather to exasperate and incite to revenge.<sup>1</sup>

Devastation of the coast, whether it be produced by land forces or by the enemy at sea, is still devastation, and there is no reason to believe that the effect upon the enemy will be different merely because the devastation is the result of bombardment rather than the result of fire and sword by land.

When the Prince de Joinville recommended in 1844, in case of war, the devastation of the great commercial towns of England, the Duke of Wellington wrote:

What but the inordinate desire of popularity could have induced a man in his station to write and publish such a production, an invitation and provocation to war, to be carried on in a manner such as has been disclaimed by the civilized portions of mankind.<sup>2</sup>

But, rejected by the Duke of Wellington, the opinion of the Prince de Joinville was recently espoused by Admiral Aube, a French naval officer, in an article in the *Revue des Deux Mondes*,<sup>3</sup> where he argued that the purpose of war is to inflict the greatest possible damage to the enemy and that—

As wealth is the sinews of war, all that strikes at the wealth of the enemy—*à fortiori* all that strikes at the source of wealth—becomes not only legitimate but obligatory. It must therefore be expected that the fleets, mistresses of the sea, will turn their powers of attack and destruction, instead of letting the enemy escape from blows, against all the cities of the coast, fortified or not, peaceful or warlike, to burn them, to ruin them, and at least to ransom them without mercy. This was the former practice; it ceased; it will prevail again. Strasbourg and Péronne assure it.<sup>4</sup>

This relapse into barbarism was like a bolt in a clear sky, because there were very few examples of the bombardments

<sup>1</sup> Hall, *International Law*, 5th ed., 533, note 2.

<sup>2</sup> Raikes, *Correspondence*, p. 367, quoted from the *Annuaire de l'Institut du Droit International*, Vol. XV, p. 149.

<sup>3</sup> *La guerre maritimes et les ports militaires de la France*, Vol. L, pp. 314–346 (1882).

<sup>4</sup> *Loc. cit.*, p. 331.

of undefended coast line and these precedents were universally discredited. The only recent example of the bombardment of a commercial town as an act of devastation was the case of Valparaíso, attacked in the year 1866 by the Spanish fleet, but, to quote the measured language of the late Mr. Hall, "the act gave rise to universal indignation at the time, and has never been defended."<sup>1</sup>

The article of Admiral Aube gave rise to great discussion, and it may be said that the proposition to subject undefended coast towns to destruction met with little or no favor. The Admiral's suggestion that they should purchase their immunity by ransom met a like fate, but a very lively and by no means unprofitable discussion has arisen over the question whether undefended ports, towns, and villages might be subject to requisitions and contributions.

There is no recent writer on international law who enjoys greater and more merited authority than the late Mr. W. E. Hall, and for this reason he is selected to voice the view of publicists.

Two questions are suggested by the above indications of opinion and of probable action on the part of naval powers. First, the restricted one, whether contributions and requisitions can be legitimately levied by a naval force under threat of bombardment, without occupation being effected by a force of debarkation; and, secondly, the far larger one, whether the bombardment and devastation of undefended towns, and the accompanying slaughter of unarmed populations, is a proper means of carrying on war. The latter question will find its answer elsewhere.

Requisitions may be quickly disposed of. They are not likely to be made except under conditions in which a demand for the article requisitioned would be open to little, if any, objection. A vessel of war or a squadron can not be sent to sea in an efficient state without having on board a plentiful supply of stores identical with, or analogous to, those which form the usual and proper subjects of requisition by a military force. It is only in exceptional and unforeseen circumstances that a naval force

<sup>1</sup> Hall, *International Law*, 5th ed., 556, note 2. For an elaborate statement of this unjustifiable and unjustified bombardment, see Moore's *International Law Digest*, Vol. VII, §1170.

can find itself in need of food or of clothing; when it is in want of these, or of coal, or of other articles of necessity, it can unquestionably demand to be supplied wherever it is in a position to seize; it would not be tempted to make the requisition except in case of real need; and generally the time required for the collection and delivery of large quantities of bulky articles, and the mode in which delivery would be effected, must be such that if the operation were completed without being interrupted, sufficient evidence would be given that the requisitioning force was practically in possession of the place. In such circumstance it would be almost pedantry to deny a right of facilitating the enforcement of the requisition by bombardment or other means of intimidation.<sup>1</sup>

Contributions stand upon a different footing. They do not find their justification in the necessity of maintaining a force in an efficient state; they must show it either in their intrinsic reasonableness, or in the identity of the conditions, under which they would be levied, with those which exist when contributions are levied during war upon land. Such identity does not exist. In the case of hostilities upon land a belligerent is in military occupation of the place subjected to contribution; he is in it and remains in it long enough to deprive the inhabitants of the equivalent of the contribution demanded, by plundering the town, or by seizing and carrying off the money and the valuables which he finds within it; he accepts a composition for property which his hand already grasps. This is a totally different matter from demanding a sum of money or negotiable promises to pay, under penalty of destruction, from a place in which he is not, which he probably dare not enter, which he can not hold even temporarily, and where consequently he is unable to seize and carry away. Ability to seize and the further ability, which is also consequent upon actual presence in a place, to take hostages for securing payment are indissolubly mixed up with the right to levy contributions, because they render needless the use of violent means of enforcement. If devastation and the slaughter of noncombatants had formed the sanction under which contributions are exacted, contributions would long since have disappeared from warfare upon land. It is not denied that contributions may be rightly levied by a maritime force; but in order to be rightly levied they must be levied under conditions identical with those under which they are levied by a

<sup>1</sup> If articles are requisitioned which are not needed for the efficiency of the force, such as articles of luxury, or articles which will not be used by it, but will be turned into money, a disguised contribution is of course levied, and the propriety or impropriety of the demand must be judged by the test of the propriety or the impropriety of contributions.



military force. An undefended town may fairly be summoned by a vessel or a squadron to pay a contribution; if it refuses a force must be landed; if it still refuses, like measures may be taken with those which are taken by armies in the field. The enemy must run the chance of being interrupted, precisely as he runs his chance when he endeavors to levy contributions by means of flying columns. A levy of money made in any other manner than this is not properly a contribution at all. It is a ransom from destruction. If it is permissible, it is permissible because there is a right to devastate, and because ransom is a mitigation of that right.<sup>1</sup>

The Institute of International Law, as was to be expected, has devoted great care and attention to the question raised by Admiral Aube, and in the session at Venice in 1896 prepared and adopted a series of articles dealing with the question, which may be taken as representing the enlightened opinion of publicists as a whole.<sup>2</sup> Important in themselves, the rules have an additional claim to our attention because they facilitated the work of the Second Conference, and the close similarity between the convention as actually adopted and the rules of the Institute will become apparent by comparison of the respective texts. Before setting forth the rules *in extenso* it should be said that the manual of the Institute referred to is the manual of the laws of war adopted at the Oxford session of the Institute in 1881, and for sake of convenience the articles referred to are printed in the footnote.

#### ARTICLE 1.

There is no difference between the rules of the law of war as to bombardment by military forces on land and that by naval forces.

#### ARTICLE 2.

Consequently, there apply to the latter the general principles enunciated in Article 32 of the manual of the Institute—i. e., it is forbidden (a) to destroy public or private property, if such destruction is not commanded by the imperious necessity of war; (b) to attack and bombard localities which are not defended.

<sup>1</sup> International Law (5th ed.), pp. 434-436.

<sup>2</sup> Annuaire, vol. xv, pp. 313 et seq.

## ARTICLE 3.

The rules enunciated in Articles 33 and 34<sup>1</sup> of the manual are equally applicable to naval bombardments.

## ARTICLE 4.

In virtue of the foregoing principles, the bombardment by a naval force of an open town—i. e., one not defended by fortifications or other means of attack or of resistance for immediate defense, or by detached forts situated in proximity to it, for example, at the maximum distance of from 4 to 10 kilometers is inadmissible, except in the following cases:

1. In order to obtain by means of requisitions or of contributions what is necessary for the fleet.

Nevertheless, such requisitions and contributions must remain within the bounds prescribed by Articles 56 and 58<sup>2</sup> of the manual of the Institute.

2. In order to destroy dockyards, military establishments, depots of munitions of war, or vessels of war found in a port.

Moreover, an open town which is defended against the entrance of troops or of disembarked marines may be bombarded in order to protect the landing of soldiers and of marines if the open town attempts to prevent it, and as an auxiliary measure of war in order to facilitate an assault made by the troops and disembarked marines, if the town defends itself.

<sup>1</sup> ART. 33. The commander of the attacking troops ought, except in case of assault, before beginning a bombardment, to do all he can to advise the local authorities.

ART. 34. In case of bombardment all needful measures shall be taken to spare, if it be possible to do so, buildings devoted to religion and charity, to the arts and sciences, hospitals and depots of sick and wounded. This on condition, however, that such places be not made use of, directly or indirectly for purposes of defense.

It is the duty of the besieged to designate such buildings by suitable marks or signs, indicated in advance to the besieger.

<sup>2</sup> ART. 56. Impositions in kind (requisitions), levied upon communes, or the residents of invaded districts, should bear direct relation to the generally recognized necessities of war, and should be in proportion to the resources of the district. Requisitions can only be made, or levied, with the authority of the commanding officer of the occupied district.

ART. 58. The invader cannot levy extraordinary contributions of money, save as an equivalent for fines or imposts not paid or for payments not made in kind. Contributions in money can only be imposed by the order, and upon the responsibility, of the general in chief, or that of the superior civil authority established in the occupied territory; and then, as nearly as possible, in accordance with the rule of apportionment and assessment of existing imposts.

There are specially forbidden bombardments, whose sole object is to exact a ransom (*Brandschatz*), and, with greater reason, those destined only to induce the submission of the country by the destruction, without other motive, of peaceable inhabitants or their property.

#### ARTICLE 5.

An open town may not be exposed to bombardment by the sole fact—

1. That it is the capital of a State or the seat of government (but, naturally, these circumstances give it no guaranty against bombardment).

2. That it is actually occupied by troops, or that it is ordinarily garrisoned by troops of various arms, destined to rejoin the army in time of war.

In the year 1900 the Naval War Code, prepared by Captain (now Admiral) Charles H. Stockton, was promulgated for the use of the navy, and Article 4 of this code is as follows:

The bombardment, by a naval force, of unfortified and undefended towns, villages, or buildings is forbidden, except when such bombardment is incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in ports, or unless reasonable requisitions for provisions and supplies essential, at the time, to such naval vessel or vessels are forcibly withheld, in which case due notice of bombardment shall be given.

The bombardment of unfortified and undefended towns and places for the nonpayment of ransom is forbidden.

We are now prepared to examine the convention regulating bombardment by naval forces in the light of the opinion of a distinguished publicist, Mr. Hall; in the light of the rules and regulations of the most distinguished body of international jurists, the Institute of International Law; and in the light of the practice of the United States.

Article 1 of the convention provides that "the bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden." This provision is simply declaratory of theory and practice. The concluding paragraph of Article 1 is new and provides that "a place can not be bombarded solely because automatic submarine contact

mines are anchored off the harbor." The paragraph last quoted simply means that the presence of automatic submarine contact mines is not of itself sufficient to justify bombardment of an otherwise defenseless port or town. The mines may undoubtedly be destroyed, but for their destruction the Conference did not regard a bombardment of the otherwise undefended town as necessary or proper. It should be said, however, that Great Britain, France, Germany, and Japan entered their reservations against this rule.

Article 2 is as follows:

Military works, military or naval establishments, depots of arms or war *matériel*, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbor, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in Paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.

An examination of this important article shows that it is declaratory of enlightened theory as well as practice; for a town used as a military or naval basis can not reasonably claim the immunity which arises solely by reason of a defenseless condition. This provision is in accord with the matured view of Mr. Hall, who says:

Of course nothing which is above said has reference to the destruction of property capable of being used by an enemy in his war. No objection can be taken to the bombardment of shipbuilding yards in which vessels of war or cruisers can be built. Of course, also, a belligerent is not responsible for devastation caused by, say, the accidental spreading of a fire to a town from vessels in harbor burnt because of their possible use as transports, or from burning naval or military stores.<sup>1</sup>

<sup>1</sup> Hall, *International Law*, 5th ed., p. 536, note 3.



It is also in accord with Article 4, Section 2 (previously quoted), of the rules of the Institute of International Law.

The last paragraph of the second article of the convention permits immediate bombardment for the destruction of the noxious material, but in such a case "the prohibition to bombard the undefended town holds good," and the commander is bound to take "all due measures in order that the towns may suffer as little harm as possible." The reason for this seeming exception from immunity provided by Article 1 is due to the fact that the local authorities may prevent the intervention of the enemy by the destruction of the noxious material. If, however, they refuse, it seems only proper to allow the enemy to use the force and the means necessary to destroy the articles in question. If damage occurs the local authorities would seem to be to blame, for they might easily have destroyed the material without subjecting the community to the possibility of injury. In any case the convention insists that the town itself shall suffer as little harm as is consistent with the destruction of the property.

Article 3 is likewise declaratory of existing law and practice, for it permits bombardment for "requisitions for provisions or supplies in question." Lest, however, the demand for requisitions might amount to a ransom or might permit devastation, it is provided that the requisitions shall be in proportion to the resources of the place. The entire article, unobjectionable in theory as it is in practice follows:

After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be commenced, if the local authorities, after a formal summons has been made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question.

These requisitions shall be in proportion to the resources of the place. They shall only be demanded in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in cash; if not, they shall be evidenced by receipts.

It will be noted that the late Mr. Hall allowed, with cer-

tain reservations, bombardment to enforce contributions, and Article 4, section 1, previously quoted, of the rules of the Institute of International Law likewise sanctioned such bombardment.

Article 4 of the convention denied the right in the following expressed terms:

Undefended ports, towns, villages, dwellings, or buildings may not be bombarded on account of failure to pay money contributions.

The remaining articles (5, 6 and 7) extend to naval bombardment the principles and restrictions already found in the laws and customs of war on land for bombardment (Articles 25, 28, revised convention). The exact text of the concluding articles of the convention concerning bombardment by naval forces follows, and needs neither explanation nor comment:

#### ARTICLE 5.

In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white.

#### ARTICLE 6.

If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.

#### ARTICLE 7.

A town or place, even when taken by storm, may not be pillaged.

The convention, therefore, is as humanitarian as it is wise, and is in strict conformity with the practice and custom of enlightened nations. The only provision of this admirable

little convention likely to produce criticism or justify objection is the concluding paragraph of Article 1, prohibiting bombardment solely because automatic submarine contact mines are anchored off the harbor. How serious this may be only the future will show, but the convention as a whole is declaratory of the practice of enlightened nations and is in accord with the views of the most recent and authoritative publicists. By removing doubt and ambiguity, by making that certain which seemed to be uncertain or questionable, the convention amply justified itself, and it can only be regarded as a genuine and further step in the march of universal progress.<sup>1</sup>

<sup>1</sup> For details see *La Deuxième Conférence Internationale de la Paix*, 1907, vol. iii., pp. 341-363, 538-550; vol. i, pp. 89-90.

## CHAPTER XIII

### THE ADAPTATION TO NAVAL WARFARE OF THE PRINCIPLES OF THE GENEVA CONVENTION; RESTRICTIONS ON THE EXERCISE OF THE RIGHT OF CAPTURE IN NAVAL WARFARE; RIGHTS AND DUTIES OF NEUTRAL POWERS IN NAVAL WARFARE

#### 1. ADAPTATION TO NAVAL WARFARE OF THE PRINCIPLES OF THE GENEVA CONVENTION<sup>1</sup>

The Geneva Convention of 1864, due to the inspiration of an enthusiast, is wholly humanitarian, with the fundamental purpose of withdrawing from the hazards of war its victims and protecting the personnel and property used in their service. For example, ambulances and military hospitals are neuter and as such protected and respected by belligerents so long as containing sick and wounded. (Article 1.) Personnel employed in hospitals and ambulances share the benefit of neutrality. (Article 2.) The inhabitants of the country bringing help to the wounded are to be respected and remain free, and inhabitants entertaining wounded men in their houses shall be exempt from quartering of troops as well as from contributions of war. (Article 5.) Wounded or sick soldiers shall be entertained and taken care of irrespective of nationality. (Article 6.) A distinctive and uniform flag, a red cross on a white ground, is adopted for hospitals, ambulances and evacuations and is always to be accompanied by the national flag; an arm badge, likewise consisting of the red cross on white ground, is to be worn by individuals neutralized. From this brief summary it will be seen that the personnel and

<sup>1</sup>For the proceedings in the First Conference see *La Conférence Internationale de la Paix*, 1899, part I, pp. 18-30; part III, pp. 3-18.

For the proceedings in 1907 see *La Deuxième Conférence Internationale de la Paix*, 1907, *Actes et Documents*, vol. i, pp. 66-84; vol. iii, pp. 293-340, 553-568.

For the revision in 1906 of the Geneva Convention of 1864, see M. Louis Renault's Report *Actes de la Conférence de Genève* (1906) pp. 243-268.



property used in tending the sick are recognized as neutral, in the sense that they take no part in the war and are therefore protected by each belligerent in their work of mercy. But the importance of the convention lies really in the idea that sick and wounded unable to take part in battle should not be left to perish by the wayside, but should be cared for and restored to health, or at least treated like men in their last moments of agony. The convention, therefore, notwithstanding its faults marked a great advance, and from the year 1864 must be dated the humanitarian treatment of the sick and wounded; for the nations realized as never before a duty resting upon them to prepare by convention in time of peace for the protection of the soldiers who in the service of their country were injured and unable to care for themselves. The special agreement between general and general, limited for the campaign or the duration of the war, had proved ineffective because the duty was really international. The mere fact that the Convention of 1864 was incomplete cannot in any wise militate against its claim to our gratitude. It is rather incumbent upon its critics to perfect the work so nobly begun.

It will be noted, that the convention is limited to the care of the sick and wounded in the field and that sailors were therefore excluded from its blessings. The naval war of 1866 between Italy and Austria and the mortality caused by carelessness or lack of care at the battle of Lissa called attention to the necessity of extending the naval provisions of the Geneva Convention of 1864. Upon the suggestion of Italy, and upon the invitation of Switzerland, a second conference met at Geneva in 1868 and drew up a series of provisions known as the Additional Articles. These consist in the first place of additions to the Geneva Convention of 1864 concerning land warfare (Articles 1-5), and in the second place of a series of provisions intended to provide care for the sick and wounded in naval warfare and to furnish the necessary machinery for this humanitarian purpose. The additional articles concerning land warfare provided in brief: that the personnel employed in hospitals and ambulances shall continue to tend the

sick and wounded even after occupation by the enemy. (Article 1.) Arrangements are to be made to assure the enjoyment of salary to the personnel falling into the hands of the enemy. (Article 2.) The term ambulance as used in the convention applies to field hospitals and other temporary establishments following troops on a field of battle to receive sick and wounded (Article 3); with the exception of officers whose detention might be important to the fate of arms, wounded falling into the hands of the enemy shall be sent back to their country after cure, or, if possible, sooner on condition of not bearing arms during continuance of war. (Article 5.) It will be seen that the additions to land warfare attempt to supply an interpretation of some of the articles of 1864 and define the term ambulance; but they otherwise add little to the convention and their nonratification cannot be said to have affected injuriously the convention they were intended to improve. It is unfortunately true that the provisions relating to maritime warfare were not adopted by the powers. They were of great value, however, as a model for future codification and as such they were used in 1899 at the First Hague Conference. The articles were not perfect, they provoked much criticism during the thirty years elapsing between their framing and their adoption in modified form at The Hague. They represented, however, the enlightened sentiment of the world that the sick and wounded should be humanely treated irrespective of nationality, and that the instrumentalities for such purposes should be respected and protected by the belligerents. This idea was not and could not be lost, and it was eminently proper that the articles served as the basis of discussion at The Hague, just as the Declaration of Brussels, unaccepted by the powers, served as the basis of codification of the laws and customs of war at the same conference.

The result of the labors of the First Conference in this matter was the "convention for the adaptation to maritime warfare of the principles of the Geneva Convention of August 22, 1864," the first authoritative regulation of the treatment of the sick and wounded in naval warfare. The convention was satisfactory, and yet, as is always the case, susceptible

of improvement. It will be noted that although the convention is based upon the Additional Articles of 1868, still it is officially connected with the Geneva Convention of 1864 in that the Red Cross regulations are applied to maritime warfare. As the Geneva Convention of 1864 was revised, one might say remade, by an international conference held at Geneva in 1906, pursuant to a recommendation of the First Conference, it seems natural that the Second Conference should take advantage of the revision in order to extend, as far as possible and in appropriate form, the principles of the revised Geneva convention to future maritime war. We thus have two conventions, approximately of the same date based upon the same experience, representing the most recent and enlightened thought of the world upon the treatment to be accorded to the sick and wounded in war whether it be on land or upon the sea. And it thus happens that the treatment of each class is regulated by two conventions; those negotiated at Geneva in 1864 and 1906, for the protection of the sick and wounded in land warfare, and the two Conventions of 1899 and 1907 negotiated at The Hague for the protection of the sick and wounded in naval warfare.

The main provisions of the revised convention will be passed briefly in review. In the first place, it will be seen that the Convention of 1899 comprises 14 articles, whereas the revised convention contains 26; but the convention of 1899 remains the framework and was only slightly revised and modified so as to bring it into as close conformity with the Geneva Convention of 1906 as the requirements of naval warfare will permit. The subdivisions of 1899 and the general order of the articles, therefore, remain relatively unchanged. The Convention of 1899 and therefore its successor of 1907 is susceptible of a threefold division: first, the series of articles devoted to vessels employed in hospital service (Articles 1-6; 1-9); second, the personnel (Articles 7; 10); third, the wounded, sick and shipwrecked (Articles 8 and 9; 11 to 17). Vessels employed in the hospital service constitute three different categories: first, they may be hospital ships belonging to the belligerent

State; second, hospital ships of a belligerent subject or citizen; third, hospital ships belonging to neutral subjects or citizens. However much these classes may differ, they have a common purpose, and therefore the rules and regulations concerning them should be of the same general nature. They should be given the full liberty required by their charitable mission. They should not, however, be so free from control as to interfere in any way with naval operations. Otherwise their presence becomes a nuisance to the belligerent and they will not be tolerated in the sphere of conflict. A distinction lies in the difference of mission; for to adopt the language of the pacifist, the mission of the belligerent ship is to furnish the victim, the duty of the hospital ship is to restore the victim to health. The duty of each being thus distinct and according to the law equally legitimate, neither should infringe upon the rights of the other, and each should be allowed the freedom of action necessary to accomplish its purpose.

The three classes of hospital ships are permitted in the neighborhood of naval operations, but, in order that a vessel should enjoy this privilege, its character should be clearly determined to the satisfaction of the belligerents, otherwise the vessel would be unable to perform its mission. The hospital ship belonging to the belligerent is a public vessel and commissioned as such, but two formalities are requisite in order that its character be fully recognized and that it be given the rights and privileges appertaining to its character. The name of the vessel should be communicated to the enemy in order that the enemy may know the character of the vessel. If it is in the hospital service, its name should be communicated to the enemy at the outbreak of the war; if it is equipped for and added to the service during the war, this fact should be communicated to the enemy at the earliest possible moment, certainly before the vessel claims the privilege belonging to it in its hospital character. The character of the vessel should likewise be clearly known to neutrals as well as belligerents, because, although a public vessel, it is not a man-of-war. It is therefore entitled in neutral ports to the privileges of a



public vessel, and it should not be subjected to the treatment of a man-of-war in regard to sojourn in a neutral port.

The second class of vessels, namely, the ship belonging to the belligerent subjects or citizens, should conform to the requirements of the public vessel if it is to enjoy the like privileges. The vessel must possess a guarantee of its character, and the best evidence of this nature is undoubtedly an official commission from the belligerent State to the vessel. The character thus being established in a form and manner acceptable to the enemy, the name of the vessel should be communicated at the outbreak of hostilities before the vessel claims the privileges essential to its mission. The commission does not make it a public much less a war vessel. Therefore it may enter freely and remain in the neutral ports. (Article 2.) These articles are retained from the Convention of 1899 without modification.

In the matter of hospital ships belonging to neutral subjects or citizens, the formalities required should be the same or greater. For example, the character of the vessel as a hospital ship should be made known to the belligerent at the outbreak of the war if possible, but in any case before the use of the vessel for a charitable purpose. The fact, however, that the vessel belongs neither to a belligerent State nor its subject may well suggest certain additional requirements; for, in the case of a belligerent public or private vessel the question of nationality does not arise, nor does the question of submission to one or the other belligerent present itself, because the character of the vessel is ascertained and its nationality unchanged. The commission of the belligerent is a sufficient guarantee both of the nature of the vessel and the purpose to which it is to be put. Therefore, the Convention of 1907 following Article 11 of the revised Geneva convention of 1906<sup>1</sup> provides that such

<sup>1</sup> A recognized society of a neutral State can only lend the services of its sanitary personnel and formations to a belligerent with the prior consent of its own government and the authorization of such belligerent. The belligerent who has accepted such assistance is required to notify the enemy before making any use thereof.—Geneva Convention of July 6, 1906, Article II.

vessel be placed "under the control of one of the belligerents, with the previous consent of their own government and with the authorization of the belligerent himself." If these conditions are complied with, and if the vessels render aid and assistance to the wounded, sick and shipwrecked of the belligerent irrespective of nationality, the vessels in question are exempt from capture during the course of hostilities. Compliance with the requirements would not alone exempt the vessel from capture, for the requirements are intended for a specific purpose, namely, aid and assistance to the victims of naval warfare.

It must not be forgotten, however, that the privilege of the hospital ships is subordinated to the rights of the belligerents, and the privilege guaranteed to the Red Cross vessel is conditioned not only upon the equal treatment of sick and wounded, but upon the fact that the vessel does not interfere with naval operations. To summarize briefly, the governments bind themselves not to employ the vessels for a military purpose; the vessels must not interfere in any way with the movements of the combatants, and during and after battle the vessels act at their own risk and peril; the belligerent possesses the right of visit and control; they may refuse their assistance, order them to withdraw, direct a particular course, place on board a commissioner and even detain them if the gravity of the circumstances require it, and, to insure compliance with the instructions of the belligerent, the orders given shall be entered upon the log book of the vessels. (Article 4.)

It is essential to the enjoyment of the privilege not merely that the vessel be commissioned and therefore have a right to its character, but that the nature of the vessel appear clearly from a distance; otherwise the mission could be performed with great difficulty, and belligerents, would be unlikely to accord to vessels plying within the sphere of operations the privileges to which they are officially entitled. Therefore Article 5 of the Convention of 1899, slightly revised in 1907, regulates the distinctive signs of the vessels in the following manner:

Military hospital ships shall be distinguished by being painted white outside with a horizontal band of green about a meter and a half in breadth.

The ships mentioned in Articles 2 and 3 shall be distinguished by being painted white outside with a horizontal band of red about a meter and a half in breadth.

The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.

All hospital ships shall make themselves known by hoisting with their national flag, the white flag with a red cross provided by the Geneva Convention, and further, if they belong to a neutral State, by flying at the mainmast the national flag of the belligerent under whose control they are placed.

Hospital ships which, in the terms of Article IV, are detained by the enemy, must haul down the national flag of the belligerent to whom they belong.

The ships and boats above mentioned which wish to ensure by night the freedom from interference to which they are entitled, must, subject to the assent of the belligerent they are accompanying, take the necessary precautions to render their special painting sufficiently plain. (Article 5.)

It will be noted, that the revised Convention of 1907 requires in addition to the national flag and the Red Cross emblem, the ensign of the belligerent under whose control they are placed. This additional requirement is borrowed from Article 21<sup>1</sup> of the Geneva convention of 1906 and seems to cling to the letter of the convention rather than its spirit; for sanitary formations are necessarily within the control of one or other of the belligerents and may properly fly the belligerent flag, but the connection of the hospital ship is not so intimate, and there seems no reason in the nature of things why this provision should be retained and grafted upon the present convention. The fact, however, that Article 3 of the convention places the hospital ship under belligerent control justifies the provision

<sup>1</sup> The distinctive flag of the convention can only be displayed with the consent of the military authorities over sanitary formations and establishments whose protection it secures. It shall be accompanied by the national flag of the belligerent to whose service the formation or establishment is attached.—Geneva Convention of July 6, 1906, Article 21.

although the circumstances of the case do not require it. This is, however, a small matter, and a flag more or less is not likely to interfere with the mission of a hospital ship.

Articles 6, 7 and 8 of the revised convention are new and regulate details in the following manner: the distinctive emblems can only be used in peace or war for the protection of vessels devoted to the hospital service (Article 6).<sup>1</sup> Infirmaries, that is to say, hospital wards of the ship, are to be respected in boarding a ship.<sup>2</sup> The protection, however, to hospital ships and wards is lost if used to injure the enemy,<sup>3</sup> a superfluous provision requiring no comment, a criticism equally applying to the concluding paragraph of Article 8, which states that the arms borne by the personnel of the vessels and used to maintain order, and for the defense of wounded and sick, as well as the presence of wireless telegraph instruments, do not forfeit the right to protection.<sup>4</sup>

<sup>1</sup> The emblem of the red cross on a white ground and the words *Red Cross* or *Geneva Cross* can only be used, whether in time of peace or war, to protect or designate sanitary formations and establishments, the personnel and *matériel* protected by the convention.—Geneva Convention of July 6, 1906, Article 23.

<sup>2</sup> Based on Articles 6 and 15 of 1906.

Mobile sanitary formations (i.e., those which are intended to accompany armies in the field) and the fixed establishments belonging to the sanitary service shall be protected and respected by belligerents.—Geneva Convention of July 6, 1906, Article 6.

Buildings and *matériel* pertaining to field establishments shall remain subject to the laws of war, but cannot be diverted from their use so long as they are necessary for the sick and wounded. Commanders of troops engaged in operations, however, may use them, in case of important military necessity, if, before such use, the sick and wounded found in them have been provided for. *Ibid.*, Article 15.

<sup>3</sup> The protection due to sanitary formations and establishments ceases if they are used to commit acts injurious to the enemy. *Ibid.*, Article 7.

<sup>4</sup> A sanitary formation or establishment shall not be deprived of the protection accorded by Article 6 by the fact that:

1. The personnel of a formation or establishment is armed and uses its arms in self-defense or in defense of its sick and wounded.

2. In the absence of armed hospital attendants, the formation is guarded by an armed detachment or by sentinels regularly established.

3. Arms or carriages taken from the wounded and not yet turned over to the proper authorities, are found in the formation or established.

*Ibid.*, Article 8, Convention of July 6, 1906.



So far only hospital ships have been considered which bear evidence of an official character, but it may be that neutral merchant ships, yachts, or boats may be within the sphere of hostile action, and that belligerents may apply to them to take on board and care for their wounded and sick. The purpose of the convention would fail, if these vessels were not permitted to take on board the sick and wounded. The character of the vessel may, however, be dispensed with for the essence of the convention is that a vessel be present, able and willing to care for the sick and wounded. Therefore, the moment that the vessel, whether summoned by the belligerent or of its own accord actually takes on board the wounded, sick or shipwrecked, it becomes entitled to special protection and certain immunities. In the performance of its mission, the vessel should be exempt from capture, but in the absence of a special exemption or promise the mission should have no retroactive effect upon the vessel. In other words, it should affect neither one nor the other by its charitable act. If it had previously rendered itself liable to capture or confiscation for unneutral conduct, it is still so liable. The immunity therefore applies to the present and future conduct of the vessel, but is wholly disconnected with its past.

It is seen, therefore, that the convention recognizes the right of the sick, wounded and shipwrecked to be cared for, in that certain instrumentalities, namely, hospital vessels, whether belonging to the belligerent State or its citizens or subjects or owned by neutral persons are permitted to gather up and care for the unfortunates of war, provided that the vessels possess an official character, distinctive marks, and devote themselves impartially to the performance of their mission. In the interest of the sick and wounded, the official character is waived in order that merchant ships, yachts, or boats may render assistance.

In the next place, the convention declares that the religious, medical and hospital staff of a captured vessel is inviolable and cannot be made prisoners of war; that on leaving the vessel the specified classes may carry with them their instruments and

private property, but may be obliged to remain and perform their accustomed services until they can be spared. As these officials render their services without respect for nationality, it follows that they are entitled to their allowances and pay, and the convention therefore requires that the belligerent captor must guarantee to them the allowances and pay to which such persons are entitled in their own service. (Article 10.)<sup>1</sup>

The third and final general division of the convention deals specifically with the sick and wounded and shipwrecked. (Articles 8-10; 11-17.) The first article of this division states and guarantees the rights of this unfortunate class in a single sentence:

Sailors and soldiers on board, when sick or wounded, as well as other persons officially attached to fleets or armies, whatever their nationality, shall be respected and tended by the captors.

While it cannot be said that this article is the most important provision of the convention, still it is the pivot about which the others turn because the very purpose and intent of the convention is that the sick, wounded and shipwrecked shall be cared for irrespective of nationality, and the machinery of the previous articles is created solely to render aid and assistance to them.

What is to be the status of the sick, wounded and shipwrecked? For if refuge upon a hospital ship deprives them of their enemy character it cannot be expected that belligerents will tolerate the presence of hospital ships within the sphere of action. To do so would mean a renunciation of the right of capture, and while a belligerent has no more use for a cripple than he has for a broken sword or exploded gun, he draws a distinction between mere injury and permanent incapacity. Therefore Article 12, which is new and incorporates Capt. Mahan's rejected amendments of 1899, stipulates that:

<sup>1</sup> While they remain in his power, the enemy will secure to the personnel mentioned in Article 9 the same pay and allowances to which persons of the same grade in his own army are entitled.—Geneva Convention of July 6, 1906, Article 13.

Any warship belonging to a belligerent may demand that sick, wounded, or shipwrecked men on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant ships, yachts, or boats, whatever the nationality of these vessels, should be handed over.

This provision is reasonable from whatever standpoint it be considered, and an attempt to deny belligerents rights necessarily incident to war can only result in a disregard of the convention, a violation of its express terms, or a denunciation of it by the belligerent. It is not without interest to recall an incident covered by this article in the short and decisive action between the *Kearsarge* and the *Alabama* off Cherbourg, in 1864. A British yacht, the *Deerhound*, hovered in the distance and picked up Admiral Semmes and various members of the *Alabama's* crew. The neutrality of the vessel should not have protected Admiral Semmes, for a vessel hovering in the distance for the purpose of rescuing one belligerent to the exclusion of the other commits an unneutral act.

In a later war, namely between Russia and Japan, a neutral man-of-war received on board the unfortunates, and the question arose as to what treatment should be accorded to them. A neutral man-of-war is not a hospital ship and clearly a belligerent has no rights upon it. The neutral man-of-war possesses extraterritoriality, and may give or refuse asylum. The action of the neutral man-of-war may be regarded as unfriendly if the enemy be not delivered up upon request. A refusal might lead to a controversy and the sword is the last argument of kings. Article 13 therefore regulates this question in advance by deciding that if sick, wounded and shipwrecked are received upon neutral men-of-war, precautions must be taken to see that they do not again take part in the operations of war.

As stated above, injury, sickness and shipwreck do not confer of themselves immunity upon the victim. If they be upon a vessel, other than a neutral war vessel, they are liable to capture and thus become prisoners of war, and it is for the captor to decide what disposition shall be made of them. It may be that he offers to keep them under his control and supervision,

or to send them to his home port, to a neutral port or even to the enemy's country. If sent to an enemy port it is to be presumed that they are not to serve during the balance of the war, otherwise the belligerent by an act as generous as it is unexpected, would be contributing to the strength of the enemy. (Article 14.) And such is the language of the convention.

But it may happen that the captor sends them to a neutral port, and Article 15 resolves the duty of the neutral as well as the consequences to the unfortunates landed upon its shores, as follows:

The shipwrecked, sick, or wounded, who are landed at a neutral port with the consent of the local authorities, must, unless an arrangement is made to the contrary between the neutral State and the belligerent States, be guarded by the neutral State so as to prevent them again taking part in the operations of the war.

The expenses of tending them in hospital and interning them shall be borne by the State to which the shipwrecked, sick, or wounded persons belong.

This article was the subject of great discussion in the First Conference, and although adopted, it was by general consent stricken from the convention, owing to the opposition of Germany, Great Britain, Turkey and the United States. It seems an unjustifiable extension of belligerent rights to permit a captor to land his prisoners of war in a neutral port. Such conduct bears no slight resemblance to the use of a neutral port as a base of operations. Again, it is difficult to imagine that the neutral can look with favor upon such conduct on the part of a captor, and it is inconceivable that a neutral should assume duties and incur expenses merely because the captor chose to relieve himself of a burden and a responsibility at the expense of the neutral. Therefore, the unfortunates may only be landed with the consent of the neutral; by general consent the neutral undertakes the duty to guard the specified classes in such a manner that they may not again take part in the operations of war. The assumption of this duty is to be presumed because the article contemplates a contrary arrangement between the neutral and belligerent State. In any case



the expenses are not to be borne by the neutral. It would seem natural that the expense incurred should be met by the captor and such undoubtedly would be the case if the classes named were to take further part in the war. As, however, they are not to take part in the war, the captor has no further connection with them and the expenses are to be borne by their home country.

The final articles of this section properly provide that the belligerents, as far as military exigencies permit, shall look after the shipwrecked, the wounded and sick in order to protect them as well as the unfortunate dead against pillage and improper treatment, and that their burial whether by land or sea or cremation shall be preceded by a careful examination of the bodies. (Article 16.)<sup>1</sup>

Article 17 is humanitarian in the highest degree, for it provides that the relatives may obtain information concerning the dead and receive where possible their belongings. I quote the article in full:

Each belligerent shall send, as early as possible, to the authorities of their country, navy, or army the military marks or documents of identity found on the dead and the description of the sick and wounded picked up by him.

The belligerents shall keep each other informed as to internments and transfers as well as to the admissions into hospital and deaths which have occurred among the sick and wounded in their hands. They shall collect all the objects of personal use, valuables, letters, etc., which are found in the captured ships, or which have been left by the sick or wounded who died in hospital, in order to have them forwarded to the persons concerned by the authorities of their own country.<sup>2</sup>

<sup>1</sup> After every engagement the belligerent who remains in possession of the field of battle shall take measures to search for the wounded and to protect the wounded and dead from spoliation and ill treatment.

He will see that a careful examination is made of the bodies of the dead prior to their interment or incineration.—Geneva Convention of July 6, 1906, Article 3.

<sup>2</sup> As soon as possible each belligerent shall forward to the authorities of their country or army the military tokens, or badges of identification, found upon the bodies of the dead, together with a list of the sick and wounded taken in charge by him.

Belligerents will keep each other mutually advised of internments and

The provisions of the section dealing with the future of the sick, wounded and shipwrecked are so carefully drawn and strike such a fair balance, between military necessity on the one hand and the claims of the unfortunates on the other, that there is every reason to believe that they will be observed in spirit as well as in letter. The unfortunates are to be cared for, but the captor is permitted to exercise his undoubted right to make them prisoners, to retain them, and to determine for himself, without embarrassment from the convention, the future of the prisoners. The neutral is pressed into the service, but only with his own consent, and expenses incurred are borne by the party for whose benefit they have been created.

The final articles are purely formal in their nature, stating that, while binding in a war between contracting powers, a non-signatory Power is not entitled to their benefit; that the commanders of enemy fleets are bound to see that the articles are properly carried out and that omissions are filled according to the instructions of their home governments in conformity with the provisions of the present convention (Article 19); that the Signatory Powers shall instruct their naval forces and make known the provisions of the convention to the public (Article 20); that the signatory powers shall likewise enact appropriate legislation punishing the violation of the convention; and that they shall communicate such legislation to each other. (Article 21.) It is provided that in case of joint land and naval action the present convention applies solely to forces actually on board ship (Article 22), the Geneva conventions of 1864 and 1906 regulating land warfare.

Finally, nonsignatory Powers which have accepted the Geneva Convention of 1906 are given permission to adhere to

transfers, together with admissions to hospitals and deaths which occur among the sick and wounded in their hands. They will collect all valuable personal belongings, letters, etc., which are found upon the field of battle, or have been left by the wounded or by those who have died in sanitary formations or other establishments, for transmission to interested persons through the authorities of their own country.—Geneva Convention of July 6, 1906, Article 4.

the present convention. Such is the convention extending to maritime warfare the generous and humanitarian principles of the Geneva Convention. (Article 24.)

## 2. THE RESTRICTION OF THE RIGHT OF CAPTURE IN NAVAL WARFARE

Little by little the theory is gaining ground that war is a relation between State and State; that the mass of people not engaged in hostilities shall not be treated as enemies or at least may only be considered as prospective enemies; that the property of the enemy on land, at least, is exempt from capture and confiscation, although it may be destroyed for a military purpose, requisitioned upon payment or promise of payment and contributions levied. The idea underlying the Geneva convention is that the man under arms and capable of using them is a danger and a menace, that by reason of injury or sickness he ceases to be enemy and acquires the right to aid and assistance in order to be restored to health. In view of these facts, the belief has grown that private property upon sea should not be destroyed unless its destruction is essential to military operations, that it might be by analogy with private property on land requisitioned, subject to contributions, but that it should not be captured and confiscated merely because it is the property of an enemy subject or citizen. Unless employed with a hostile purpose, it is as innocent as a noncombatant and should not be molested. Practice, it must be said, looks askance at theory and while it condemns capture upon land permits it upon water. The partisans of the immunity of private property upon the high seas look with favor upon any recognition of their theory, however slight, and the convention imposing certain restrictions upon the exercise of the right of capture in maritime war is peculiarly pleasing to them, for it is, as it were, an entering wedge.

The preamble of this little convention betrays a certain nervousness lest a general statement disclose the fact that

the new doctrine has really gained upon the old. It recognizes "the necessity of more effectively insuring than hitherto the equitable application of law to the international relations of maritime powers in time of war," a statement which may mean very much if *equitable* be taken in the large sense. The succeeding paragraph is, one might almost say, storm tossed. Considering that for the equitable application, "it is expedient," to quote again the preamble:

in giving up, or, if necessary, in harmonizing for the common interest certain conflicting practices of long standing, to commence codifying in regulations of general application the guarantees due to peaceful commerce and legitimate business as well as the conduct of hostilities by sea; that it is expedient to lay down in written mutual engagement the principles which have hitherto remained in the domain of controversy or have been left to the discretion of government, that, from henceforth, a certain number of rules may be made, without affecting the common law now in force with regard to the matters which that law has left unsettled.

The words are indeed many, the thoughts are very few. One might expect from the high sounding phrases that much was to be given up or that much was to be regulated, but it may be said that the least possible concession to the immunity of private property is given which it is possible to give. The slightest gift, however, is a recognition of the principle.

The convention consists of three principle chapters dealing respectively with postal correspondence; the exemption from capture of certain vessels, and regulations regarding the crews of enemy merchant ships captured by a belligerent.

First of postal correspondence:

"In the actual state of international law" says the learned reporter of the convention, "the transmission of postal correspondence by sea is not assured in time of war by any serious guarantee. A distinction is indeed made according to the private or official character of the correspondence, according to the personality of the sender, and the addresses belonging or not to the service of the enemy, according to whether the vessel is a regulation mail ship, or, finally, according to the place of departure or of destination. The result is none the less, in point of fact, seizure, opening of the mail-bags, spoliation, in



case of need, confiscation. In every case delay or even loss is the lot ordinarily reserved to mail-bags traveling by sea in time of war."<sup>1</sup>

In view of all these facts "it is expedient," in the language of the preamble, "to lay down in written mutual agreement the principles which have hitherto remained in the uncertain domain of controversy or have been left to the discretion of governments."

The convention therefore provides in Article 1 that the postal correspondence of neutrals or belligerents, whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.

In other words, postal correspondence is declared to be inviolable irrespective of its nationality or nature. Nor is the correspondence tainted by its surroundings. It is inviolable whether it be carried by a neutral or enemy ship. If the ship be detained or confiscated it is only natural that the correspondence does not share its fate and is to be forwarded with the least possible delay.

In the preceding article it is conclusively presumed that the correspondence is innocent and the article suggests no way in which this presumption may be rebutted or overcome. However, in the concluding paragraph of the article guilt is imputed, and in such a case the inviolability does not attach. For example, "the provisions of the preceding paragraph do not apply in the case of violation of blockade, to correspondence destined for or proceeding from a blockaded port." A blockaded port is isolated providing the blockade is effective, otherwise it is not binding. Trade with the blockaded port is forbidden, as well as all ingress or egress. Therefore, it follows naturally that correspondence, however inviolable elsewhere, may be excluded from blockaded ports. While international law looks with favor upon the mail ship it is not exempt from

<sup>1</sup> Report to the Conference by M. Henri Fromageot, *La Deuxième Conférence Internationale de la Paix*, 1907, Actes et Documents, Vol. I, p. 266.

capture if it belongs to the enemy.<sup>1</sup> If it be neutral it is subject to the laws and customs of maritime war. But if it be a mail ship the presumption either should be against searching it or the search should be only when absolutely necessary and then only, to quote the language of Article 2, "with as much consideration and expedition as possible."

The next chapter of the convention deals with the exemption from capture of certain vessels. The articles are but two in number and either declaratory of the law of nations, or of the most enlightened international usage. For example,

Vessels used exclusively for fishing along the coast, or small boats employed in local trade are exempt from capture, as well as their appliances, rigging, tackle and cargo.

Analyzing this article it appears that the fishing smacks are engaged in inshore fishing and that they are to be used exclusively for fishing. This is the law of the United States as laid down in the *Paquete Habana*,<sup>2</sup> a case involving the capture of fishing smacks off the coast of Cuba. The Supreme Court held in an elaborate and very learned opinion, in which the authorities are practically exhausted, that such smacks are not subject to capture. The second paragraph, however, marks an advance toward the immunity of private property, and the proposal came from Austria-Hungary, a partisan of the doctrine. Small boats employed in local trade are exempt from capture. It will be noted that the provisions are very general in their nature, the size or character of the vessels is not specified nor is the coast, whether it be the home coast or a coast belonging to another country. In the discussion, the coast of Morocco was used as an example. Nor is local trade defined or specified. The conference meant to be generous, and it is not too much to predict that these stipulations will be very broadly interpreted; for people engaged in this trade are harm-

<sup>1</sup> The *Panama*, 176 U. S., 535 (1899).

<sup>2</sup> Coastfishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. —The *Paquete Habana*, 175 U. S. 677, 708 (1899).

less to the enemy, necessary to the home country, and are dependent for their small earnings upon the right to follow their calling notwithstanding the existence of war.

But the right, small as it is, is forfeited by taking any part whatever in hostilities. On the other hand, the contracting powers agree not to take advantage of the harmless character of the vessels in order to use them for military purposes while preserving their peaceful appearance. This final paragraph of Article 3 is too clear for comment, for fraud in nations is certainly as reprehensible as in individuals, although less frequently punished, and the contracting powers should not set a bad example to their citizens and subjects.

Article 4 provides that "vessels charged with religious, scientific or philanthropic missions are likewise exempt from capture," a provision declaratory of international law.<sup>1</sup> It is unnecessary to state that the exemption cannot be claimed if there be the slightest participation in the war.

These are, it must be admitted, very modest provisions, but if they are in the interest of innocent commerce it is difficult to see how the extension of immunity to unoffending enemy property in general would not be still more commendable. In considering the American proposition for the immunity of enemy property in general and the modest result obtained, due, not to the initiative of the American delegation, but to M. de Martens, an opponent of the immunity, one is reminded of the mountain in labor that brought forth a mole.

The final chapter of the convention, consisting of four

<sup>1</sup> Finally vessels engaged in exploration or scientific discovery are granted immunity from capture. The usage began in the last century when Bougainville and La Pérouse appear to have been furnished with safe conducts to protect them in the event of war breaking out during their voyage, and the French government in 1776 ordered all men-of-war and privateers to treat Captain Cook as a neutral so long as he abstained from acts of hostility. During the present century there have been several occasions on which there has been reason for behaving in a like manner, and on which accordingly vessels have been furnished with protection. The most recent of these was the dispatch of the Austrian Corvette Novara on a scientific expedition in 1859.—Hall's International Law (5th ed.), p. 425.

articles, is a further recognition of the principle that only actual participants in war shall be considered and treated as enemies. An enemy merchant ship is still liable to capture, but the crew, subjects or citizens of a neutral State, are not to be made prisoners of war. A different rule is applied by the convention to captains and officers. These are not set at liberty as of course; they are required to promise formally in writing not to serve on an enemy ship during the war. The reason for the distinction seems to be that the crew must perforce take service wherever they find it. The captain and officers are supposed to be more intelligent and therefore able to choose. In any case the convention established the distinction.

The convention then considers the case of officers and crew belonging to the enemy, and makes their liberty depend upon the reasonable condition that they make formal promise in writing not to undertake during the continuance of hostilities any service connected with the war. The distinction between the two classes seems to be founded in reason, because a neutral, even although employed upon an enemy merchantman, is only an enemy by construction and should not be treated permanently as an enemy; whereas the enemy is liable at any time to be pressed into service and the experience had upon a merchantman may be turned to good account upon a man-of-war. The merchant marine was the training school for the navy in former times, and many a skillful American sailor was impressed into the British navy in the days of visit and search and did good service notwithstanding the wrongfulness of the transaction. But the service on a man-of-war is very different from the training of the merchantman, and it is doubtful whether the merchantman supplies many sailors to the modern navy.

The learned reporter considers in his able commentary the form of the promise and states it to be the same as in the previous article. It is understood that a sailor who does not know how to write or sign his promise should have it acknowledged in writing before witnesses of his nationality and in the



presence of the captain. It did not seem necessary, he adds, to introduce the detail of this formality into the text.<sup>1</sup>

As in the case of the exemption of fishing smacks and small boats engaged in local trade, so in the present chapter the coöperation of the State is required. For example, the names of the neutral captains and officers are notified by the belligerent captor to the other belligerent so that he may not knowingly employ these persons and the belligerent is forbidden in express terms by the convention to employ them. The temptation is thus removed from both parties. It need hardly be said that the provisions of this chapter do not apply to ships taking part in hostilities. The exemption from capture is based solely upon the fact that their occupation is innocent and in no way connected with the war. Otherwise if captured they are prisoners.

### 3. THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN NAVAL WARFARE<sup>2</sup>

“Neutral rights and duties” are phrases with which international law is very familiar, but, notwithstanding their frequency, they are neither universally nor accurately defined. The neutral stands upon its right, the belligerent insists upon the duty, and the result is a compromise depending upon the circumstances of the case or upon the weakness of the neutral and the force at the disposal of the belligerent. Therefore, it is not to be wondered at that the subject bristles with difficulties, and it is astonishing that a convention was agreed upon rather than that its stipulations are not in all respects satisfactory. The convention, is, however, the result of deep and prolonged discussion, and the powers seemed genuinely desirous to reach an agreement. The result is a compromise in which extreme pretension of belligerent right yielded to neutral concession. And however defective and indefinite some of its provisions may be, the convention is an earnest and solid bit of work.

<sup>1</sup> Report of M. Fromageot, *La Deuxième Conférence Internationale de la Paix*, 1907, Actes et Documents, Vol. I, p. 268.

<sup>2</sup> See the careful and elaborate report of M. Renault in *La Deuxième Conférence Internationale de la Paix*, 1907, Actes et Documents vol. i, pp. 295-326.

It is a serious attempt to codify a very important subject and there can be no doubt that it is conceived along correct and progressive lines. It is unfortunate, however, that the regulations adopted by the Conference often state rather than impose a general principle, leaving the neutrals the right to vary it by local legislation.

The convention concerning the rights and duties of neutral states and persons in land warfare declares properly that the territory of neutral States is inviolable. The present convention is based not merely upon the fact that neutral States are inviolable but that neutral States are sovereign; that their rights spring from sovereignty, and that the duties imposed upon them are duties upon sovereign States in the interest of the community of nations. If, therefore, it be a principle of international law that the neutral State be both inviolable and sovereign, it follows that a belligerent commits a wrong in violating neutral territory and thus infringing neutral sovereignty. It may be the duty of the neutral to prevent this action on the part of the belligerent, but it is a duty called into being by virtue of a wrongful belligerent act. The belligerent should be forbidden to commit the act in question and if this act violates neutral territory, therefore neutral sovereignty, the neutral may resent it. If the act committed within neutral jurisdiction injures another State, the neutral must resent it and take appropriate measures to correct it. This idea underlies the convention and is its distinctive characteristic. It is expressly recognized in its first article which deserves quotation.

Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

The modern theory of neutrality is embodied in this article. The belligerent is bound to abstain from, and the neutral dare not permit the act; for if the belligerent commits an act within neutral jurisdiction injuriously affecting another belligerent, the neutral may be said to make itself a party to the act, if done with its knowledge. If it permits the act to go without

protest and if it does not endeavor to undo the consequences of the act, the neutral allows its territory to be used as a basis of operations; hence the duty imposed, hence the limitation upon the untrammelled sovereignty of the neutral. It may make itself an open ally of the belligerent; it cannot allow the belligerent the benefit of hostile acts without alliance. Its self-respect should resent the action of the belligerent, the disadvantage to the injured States imposes a duty. The older practice found the essence of neutrality to consist in extending an equal right to both belligerents; the modern doctrine insists that the neutral shall no longer suffer; it must prevent a hostile act by either belligerent within its territory. It is not a party to the war, it cannot be made to render assistance or its territory used without becoming a party.

It therefore follows that capture by either belligerent within neutral waters is not only a violation of neutral sovereignty but of neutrality as well, because, if permitted, neutral territory is at once made the basis of hostile action. In the same way the exercise of the right of visit and search within neutral waters is inconsistent with a respect for neutrality, because visit and search being a belligerent act its exercise within neutral waters is the prosecution of hostilities within neutral waters. The belligerent therefore should be forbidden to make such use of neutral territory and the neutral should resent it, in the interest of the other belligerent if not in its proper interest. Therefore Article 2, forbidding every act of hostility including the right of capture and the exercise of the right of visit and search, is declaratory of modern international law and enlightened practice. But supposing an act of hostility has been committed, for example, an enemy vessel has been captured within neutral waters, what steps should be taken to redress the wrong? Neutral sovereignty has been violated, but as the neutral is sovereign it may overlook the violation, indeed, it may find it to its interest to do so if it be a very small power and the captor very powerful. The wrong, however, is not confined to the neutral, because, by reason of the violation of neutral sovereignty, property of the belligerent

has been seized, and it may be destroyed. The enemy property, we will suppose, was rightfully within neutral jurisdiction and the neutral power owed it protection against wrongs committed within its jurisdiction. Therefore the injured belligerent has a right to complain. A duty therefore is imposed upon the neutral for the benefit of the injured belligerent. The neutral should redress the wrong, and the best redress is to undo the wrong by seizing the captured property, technically called the "prize," and delivering it to its rightful belligerent owner. It may be that the neutral is unable to restore the prize, but it should use the means at its disposal to release it with its officers and crew, and to intern the prize crew which the captor unlawfully placed upon the vessel. More cannot well be asked, less would associate the neutral with the hostile act. And such is the provision of Article 3.

It may be, however, that the captor has escaped with the prize. This cannot, however, change the duty of the neutral to secure the return of the prize to its rightful owner. It affects solely the means, for the neutral can no longer seize the property within its jurisdiction and cause its return. It should not be obliged to follow the captor upon the high seas in order to take possession of the property, for this would punish the neutral for the hostile act of the belligerent. The neutral, therefore, should only use the power in its control, protest against the violation of its sovereignty and insist that the prize and its crew be liberated. This likewise is the requirement of Article 3 and is in strict accord with the theory and practice of nations.

Captures have unfortunately been made in neutral waters and controversies arising from such unneutral conduct have been long and bitter. The capture of the *General Armstrong*, an American privateer, in the territorial waters of Portugal by a British squadron, during the War of 1812 between Great Britain and the United States, has been referred to and the settlement of the claim of the United States against Portugal by arbitration of the Prince President of France has been



noted. As is well known the United States eventually paid its own claimant a lump sum in satisfaction of the claim.<sup>1</sup>

Another case arose during the same war by reason of the capture in 1815 of the *Levant*, the twin prize of the frigate *Constitution*, in the Portuguese port of Praga, anchored close to the land battery.

She was in this position when the enemy's ships stood in, fired at her, and forced her to surrender, took possession of her, and carried her out of the harbor, without the Portuguese authorities attempting to hinder or prevent them, or offering any resistance or remonstrance to the violation of the neutral rights and sovereignty of Portugal.<sup>2</sup>

On suit brought by Commodore Stewart, the famous commander of the *Constitution*, to obtain compensation for the loss of the prize, the Court of Claims held, and rightly, that in 1815 capture transferred title to the United States and that it was only vested in the individual captor by the decision of a competent court of prize.

There can be little doubt that the facts set forth in the petition show that the officer in command of the British squadron was guilty of the violation of the neutral rights of Portugal in making in her territory the scene of conflict with and capture of this vessel. For such an insult to her sovereignty and invasion of her first rights as a neutral, she had just grounds, under the law of nations to claim indemnity and reparation from Great Britain. It is equally clear, we think, that the United States had the right to insist upon indemnity from Portugal for this invasion of her right of asylum in a neutral port.<sup>3</sup>

The language of Sir William Scott is more pointed.

When the capture within the neutral territory is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding it may actually belong to the enemy.<sup>4</sup>

Great Britain violated neutral rights in the cases of the *General Armstrong* and the *Levant*, but the United States was

<sup>1</sup> See Chapter V, pp. 235-236.

<sup>2</sup> Commodore Stewart's Case, 1 Court of Claims 113 (1864).

<sup>3</sup> *Ibid.*

<sup>4</sup> *The Vrouw Anna Catharina*, 5 Rob. 15 (1803).

equally guilty in the case of the *Florida*, unlawfully captured in 1864 in the territorial waters of Brazil, during the war between the States,<sup>1</sup> and in the case of the *Chesapeake* seized in 1863 within the territorial waters of Nova Scotia.<sup>2</sup> In both cases, however, the United States made reparation. On August 11, 1904, in the recent Russo-Japanese War, Japan seized and removed by force from a Chinese port, Che-Foo, the *Ryeshitelni*, a Russian torpedo boat destroyer, which had taken refuge in the neutral port. For this violation of the law of nations no apology was made or satisfactory reason given.<sup>3</sup>

These examples taken from the nations recognizing and ordinarily applying international law in their foreign relations show that a restatement of the law in the form of a universal convention was not wholly without reason.<sup>4</sup>

If the sovereignty of a nation be taken as the key to the convention, Article 4, which provides that, "A Prize Court cannot be set up by a belligerent on neutral territory or on a vessel in neutral water," will require little comment or explanation. A nation must be supreme throughout its entire jurisdiction, otherwise it cannot be considered independent. The establishment of a court is an exercise of sovereignty. If a belligerent establishes a court, it exercises a sovereign right within neutral territory. It is at once evident that the sovereignty of the neutral cannot permit either its territory or its waters to be thus used by a belligerent without its consent, and if it consents it becomes an ally: it ceases to be neutral.

The reprehensible conduct of "Citizen" Genet in fitting out vessels to cruise against Great Britain and in creating courts in the United States for the trial and condemnation of vessels captured even in American waters is known to every school-boy. Our government could not and did not submit to such violations of its neutrality.

<sup>1</sup> See Chapter X, pp. 485-486.

<sup>2</sup> Moore's *International Law Digest*, vol. i, 366, vol. vii, 937.

<sup>3</sup> See Hershey's *International Law and Diplomacy of the Russo-Japanese War*, pp. 258-263.

<sup>4</sup> The reader will note the apparent conflict between the provisions of Article 3 and the corresponding article in the Prize Court Convention.

The sovereignty of the neutral is likewise the key to Article 5, although the inhibition is against the belligerent. For example, it is forbidden

to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.

It is to be noted that the article is divided into two parts, and that the inhibition is twofold, first the belligerent shall not use neutral ports and waters as a basis of naval operations, and secondly, the belligerent shall not use them as a basis for communicating with its land or naval forces. The failure to give full effect to the provisions of this article threatened at one time a war between Great Britain and the United States, for it will be recalled that under protest Great Britain permitted its ports and territorial waters to be used by the Confederate States as a basis of naval operations against the United States. The controversies arising out of the unneutral conduct of Great Britain were fortunately settled by arbitration at Geneva, but the principles of law, the so-called "rules" for the guidance of the court, were determined by Great Britain and the United States by Article 6 of the Treaty of Washington, in 1871. The first part of the second rule was thus expressed: "A neutral government is bound not to permit or suffer either belligerent to make use of its ports or waters as the basis of naval operations against the other." It will be observed that the neutral is taxed with a duty, and rightly so, because the unneutral act had already taken place and the purpose of the treaty was to render the neutral responsible for its coöperation or negligence. The present convention, however, aims to prevent the commission of such acts and therefore imposes a duty upon the belligerent not to commit such an act. It is evident that the commission of the act renders the belligerent liable to the neutral; it is equally evident that, in the language of the Treaty of Washington, "a neutral government is bound not to permit or suffer either belligerent to make use of its ports or waters as a base of naval opera-

tions against the other," because by so doing it will undoubtedly render itself liable in the future as it did in the past to the injured belligerent. It is frequently maintained that the three rules of the Treaty of Washington were not declaratory of international law at the time of their adoption; and that they are therefore only binding upon the parties to the treaty, namely, Great Britain and the United States. It is insisted with greater reason that the three rules represent correctly international law and that no nation would be likely to disregard them. However this may be, the three rules of Washington made their formal entry into international law and are recognized both in letter and spirit by the present convention. The final clause of Article 5 deals with the means of communication and prohibits belligerents from using neutral ports and waters as a basis of communication with their armed forces. The convention concerning neutral powers and persons, Article 3, paragraph *a*, forbade belligerents to install wireless stations upon neutral land, and the present convention adopts and extends this to the territorial waters, and rightly, because the act should be forbidden within neutral jurisdiction and neutral jurisdiction is supreme within its territory and territorial waters. The principle is therefore one and the same. Its recognition is twofold.

It will be observed that the first five articles which have been passed briefly in review aim to prevent the belligerent from infringing neutral sovereignty. The duty is thus imposed upon the belligerent who is forbidden in express terms to commit certain acts within neutral territory which are likewise an injury to the co-belligerent. The neutral is of course involved, but his duty is predicated upon an unlawful and therefore unpermissible act of the belligerent. The convention, however, deals directly with the neutral and designates certain acts as unneutral and therefore not permitted. It may be wrong for the belligerent to take advantage of such acts, but the illegality in the first place arises from neutral misconduct and therefore a direct duty is imposed upon the neutral not to commit the act specified. For example, "the



supply in any manner, directly or indirectly by a neutral power to a belligerent power, of warships, ammunition, or war material of any kind whatever, is forbidden." The purpose of this article is to forbid the State directly or indirectly from participation in hostilities, whether it be by sale or delivery of warships, ammunition, or war material of any kind. It would seem, therefore, to be improper for a State to furnish a belligerent with a loan for the purpose of war. It would be likewise improper for a State to sell or present its navy, to open its arsenals or even to dispose of its wornout equipment, for by so doing the State directly aids a belligerent. Neutrality, as has been stated, involves more than impartiality. It requires the State to abstain from any act conceived, calculated or which actually does aid and abet the enemy. It is unfortunately true that our country has at times measured its neutral duty by another standard.

The sale by the United States to agents of the French government during the Franco-Prussian War of arms and munitions of war which had accumulated during the Civil War was unjustifiable from every point of view.<sup>1</sup>

The State is thus forbidden to furnish the means of war. Does a strict and progressive neutrality prevent its subjects or citizens from doing the acts which the State is specifically forbidden to do? It is too clear for argument that "supplies of food, clothing, arms, ammunition, and in general anything of use to any army or fleet" must have a direct bearing upon the conduct of war and tend to prolong it. There may be no difference in the ultimate result whether these supplies are furnished by the State or by its citizens. The act whether by State or individual necessarily inures to the benefit of one or the other belligerent, and to this extent it is unneutral and therefore wrong. But practice recognizes, and rightly, a distinction between the intervention of the State and the activity of the individual. If the State directly or indirectly furnishes the supplies, it is a State act, which entitles the belligerent to

<sup>1</sup> See Moore's International Law Digest, Vol. VII, §1309, pp. 973-975.

protest; it is to be presumed that the neutral State understands the character of the act as clearly as the belligerent and has decided in advance to take the consequences involved in the transaction. Grown wiser, the neutral may regret its action and compensate the belligerent or submit the question of liability to arbitration, but the act is a State act and gives the belligerent the right to redress by diplomatic means or by war. Suppose the neutral has furnished the supplies, but that they are seized by one belligerent before they are delivered to the other. The seizure will be regarded as a "grave incident," public feeling will be aroused, passion inflamed, and the neutral may be forced or at least encouraged to defend by force its unlawful act. Therefore the convention proscribes any transactions of this nature, directly or indirectly traceable to a neutral State.

Supplies furnished by an individual, however, are susceptible of different treatment, for in trading in these commodities he subjects himself to the risk of seizure and confiscation. The act is not so criminal or wrong in itself as to compel the neutral to seize the commodity, and punish the act. But international law allows the belligerent to intercept the commodity and forfeit it if delivery to the other belligerent would be beneficial. Trade in contraband is not unlawful, nor is a neutral bound to prevent its subjects or citizens from proceeding to a blockaded port. If a neutral were obliged to scrutinize every package leaving its territory, it would assume a very heavy responsibility. The belligerent has a right to stop such commerce upon the high seas, and as he is himself the cause of the war, he should not shift upon the neutral the burden of preventing such trade. The following paragraph from Professor John Bassett Moore sets the matter in its proper light:

Much misapprehension as to the quality of the act of supplying contraband articles, such as arms and munitions of war, to the parties to an armed conflict, has arisen from the statement so often made that the trade in contraband is lawful and not prohibited. This statement, when used with reference to the preventive duties of neutral governments, is quite correct, but if applied to the duties of individuals it is quite incorrect. The

acts which individuals are forbidden to commit and the acts which neutral governments are obliged to prevent are by no means the same; precisely as the acts which the neutral government is obliged to prevent and the acts which it is forbidden to commit are by no means the same. The supply of materials of war, such as arms and ammunition, to either party to an armed conflict, although neutral governments are not obliged to prevent it, constitutes on the part of the individuals who engage in it a participation in hostilities, and as such is confessedly an unneutral act. Should the government of the individual itself supply such articles it would clearly depart from its position of neutrality. The private citizen undertakes the business at his own risk, and against this risk his government can not assure him protection without making itself a party to *his unneutral act*.

These propositions are abundantly established by authority.<sup>1</sup>

The Conference was unwilling to forbid the individual as well as the State from furnishing supplies and ammunition. In Article 7 of the convention it is expressly stated that "a neutral power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunitions, or, in general, of anything which could be of any use to an army or fleet," and in Article 7 of the convention concerning the rights and duties of neutral powers and persons, the Conference recognized in the same terms that such a duty is not incumbent upon a neutral. It must be admitted, therefore, that the presence of the two articles in precisely the same wording in two different conventions of one and the same Conference can only mean that the neutral should not be taxed with responsibility for the act of its citizen or subject, which, if committed by the neutral, is admittedly unlawful. It does not follow, however, that the neutral should not forbid such transactions. It does not assume an international obligation to do so.

To continue the consideration of the duty imposed upon the neutral, for Article 7 may be regarded as an aside, the difficult and embarrassing question arises, in how far and by what means should the neutral prevent the violation of its neutrality? It would be absurd to say that the neutral is bound to prevent the violation of its neutrality, because it may not be

<sup>1</sup> Moore's International Law Digest, Vol. VII, p. 748.

able to do so by the employment of its land and naval forces. On the other hand, the duty of the neutral should not be limited to mere protest because we do not wish condemnation but prevention to be had. The reason of the thing should be examined, and a neutral State should be held quit of responsibility when it has honestly and in good faith used the means not merely at its disposal but the means which a reasonable person would consider adequate to prevent the violation of its neutrality.

The first rule of the Treaty of Washington expressed the obligation in the following manner:

A neutral government is bound—

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

The Geneva tribunal gave an authoritative interpretation of the expression "due diligence" which, to quote M. Renault, has become celebrated by its obscurity since its solemn interpretation."<sup>1</sup> The Geneva tribunal said that

the "due diligence" referred to in the first and third of the said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligations of neutrality on their part.

The Conference accepted the principle of the first and third rules of the Treaty of Washington, and sought by a carefully drawn article to define the duty incumbent upon a neutral government

to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, p 302.



departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war. (Article 8.)

The neutral is thus obliged to prevent the fitting out of the vessel within its jurisdiction by "the means at its disposal," and to use the same vigilance to prevent its departure. It thus appears that not only the spirit of the first rule of Washington is adopted, but the wording of the article seems peculiarly clear, skillful and happy.

A superficial examination of the preceding articles shows that the restrictions laid upon the belligerent are in order to prevent the commission of a hostile act within neutral jurisdiction, and the duty imposed upon the neutral is not merely to prevent this but if done to undo the consequences. It follows, therefore, that the access of the belligerent is not in itself forbidden: it is the act done after entering neutral jurisdiction that condemns the belligerent and forces the neutral to action. Therefore, it would seem unnecessary in the interest of belligerent and neutral to forbid all access to the territorial waters and jurisdiction of the neutral, because the presence of the belligerent within such jurisdiction is consistent with innocence, and a strict observance of the requirement of neutrality. If, however, the key-note of the convention be borne in mind, namely, the sovereignty of the neutral, it follows that the admission or the nonadmission of a belligerent depends upon the discretion of the neutral, and it is for the neutral to decide whether the passage through its territorial waters may jeopardize its neutrality. Therefore, a rule which would exclude the belligerent wholly from neutral waters or ports would seem to be not only inadvisable but harsh, as it is not the presence but the unlawful conduct of the belligerent within neutral jurisdiction which can be of interest to the other belligerent and neutral powers generally. But it is of the essence of neutrality that the determination of the neutral to admit a belligerent, and the rules and regulations issued for its conduct should apply impartially and indiscriminately to the other belligerent. While the propriety of admission is a question

for the neutral, still the presumption is clearly against admission of an enemy vessel which has "failed to conform to the orders and regulation made by it or which has violated its neutrality;" and such are the requirements of Article 9.

The Conference, however, felt a little delicacy about the admissibility of enemy vessels and their prizes, and deemed it inadvisable to dismiss the matter with the statement that the rules and regulations concerning admission should apply to both belligerents, and that a belligerent which had violated neutrality might be refused admission. It therefore stated in Article 10 that neutrality is not violated by the mere passage of men-of-war and their prizes through territorial waters. In the same way that a neutral can permit the belligerent to enter and pass through its territorial waters without violating neutrality, the neutral can assuredly allow the belligerent to make use of its licensed pilots without raising the question of neutrality; for if the man-of-war be permitted to enter, it would seem that the neutral may well be permitted to supply it with the means of safety during the sojourn in its waters. The language of the convention, however, is permissive, the neutral "may" allow belligerent warships to employ his licensed pilots; it is not compelled to do so. Notwithstanding the permission accorded in the text which as a matter of fact is a self-evident and natural consequence of sovereignty, it is safe to assume that the neutral should satisfy itself that the purpose of the belligerent is innocent, and that the employment of the pilot will be in no way connected directly or indirectly with an act of war.

The belligerent being thus permitted to enter and pass through territorial waters of the neutral, and with its consent to employ its licensed pilots, the question arises naturally whether the belligerent may remain in territorial waters without making them the base of operations and thus compromising the neutrality of the port. This question gave rise to a long and animated discussion, for the right of a belligerent to remain cannot be unlimited. It must depend upon the volition of the belligerent, upon the determination of the neutral,

or upon the practice of the Community of Nations. If it depend upon the belligerent, the port of entry becomes a port of refuge within which he is secure from attack, and from which he may issue to execute a warlike intent. If the length of sojourn depends solely upon the neutral it may vary by friendship for the belligerent, or be influenced by prejudice against its opponent so that there is danger to fear that the time accorded may bear a definite relation to the real or supposed strength of the neutral. This is tantamount to saying that there is no rule and thus there is a lack of certainty; for neither the belligerent nor the neutral nations may know in advance the content of a rule which depends upon the circumstances of a particular case. The practice of the Community of Nations would, therefore, be a safer guide and the tendency at the present day undoubtedly is, while permitting the belligerent to enter, to limit the sojourn to 24 hours. It is supposed that the belligerent can accomplish a legitimate and permissible purpose within such period of time, may repair traveling damage, procure supplies necessary for the peaceful prosecution of the voyage, and load a sufficient amount of coal to enable it to proceed. The partisans of the 24 hour rule insisted that it should be prescribed by the convention and thus made a constituent part of international law. Its opponents were disposed to recognize the reasonableness of the rule in general, but to question its applicability on certain occasions. The purpose of the rule is to prevent a belligerent from making a neutral port the basis of hostile operations. In the neighborhood of the enemy the rule might well be applied, but suppose the port into which a belligerent entered was far removed from the scene of hostilities. The reason of the rule failing, the rule itself should cease. For example, in the case of a war between France and Germany (which God forbid!) a French or German cruiser might well remain more than 24 hours in Buenos Aires, and in a war between Germany and Great Britain, either belligerent might prolong its stay in Rio de Janeiro beyond sunset to sunset. The answer to this proposition presented by Germany was that the rule should be so pre-

cise that belligerent and neutral might know in advance its duty, irrespective of the nearness or remoteness of the naval operations. If we bear in mind the sovereignty of the neutral nation, it is possible to compromise the two views by prescribing in default of special legislation to the contrary the general rule of 24 hours. It may be urged that this is a disposition of the question which settles nothing, because the States do not definitively limit the enemy vessel to 24 hours, because the neutral nation can by local legislation lengthen the period. The objection is well founded, but the rule is not so elastic as might be imagined; for it limits the sojourn to 24 hours, and to prolong this period it requires definite affirmative action of the neutral. In the absence of such action, the rule is rigid, and it is not to be presumed that a neutral will capriciously extend the period. Indeed the very existence of the provision is a guarantee of its correctness and its presence in a convention questions the advisability of its extension. A powerful neutral may not care to lengthen the period, a weak neutral is strengthened by the provision. Owing to the importance of this stipulation, I quote the article:

In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent warships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than 24 hours, except in the cases covered by the present Convention. (Article 12.)

For a like reason I translate the comment of M. Renault in his official report:

The rule admitted by the majority is, then, that in default of special provisions in the legislation of the neutral State, belligerent vessels are forbidden to remain in the harbors, and roadsteads, or in the territorial waters of this State longer than 24 hours. The idea is that a precise rule is indispensable. Each State is left free to establish it. In default of its establishment, the convention fixed the period of 24 hours.<sup>1</sup>

<sup>1</sup> M. Renault's Report to the Conference, *La Deuxième Conférence Internationale de la Paix*, 1907, Actes et Documents, Vol. I, p. 308.)



It will be noted that no distinction is made between the simple entry and sojourn en route to the theater of hostilities, and the use of the port as a refuge from defeat. A regulation of the local legislation, it is presumed, would apply to each situation. There can be little doubt, however, that a neutral would distinguish the two cases even although there were but a single law applicable to both situations; for furnishing refuge to a defeated belligerent and protecting its vessel from capture would question the good faith of the neutral. If the vessel appeared in a damaged condition, it is certain that the neutral would not permit it to be repaired for a hostile purpose, and if it did not depart within 24 hours, recent practice suggests, indeed makes it a certainty, that the vessel and crew would be interned. This subject, however, need not detain us at present for it will be discussed in connection with Article 17.

But the same question may present itself in a different form, namely, the belligerent man-of-war may have entered the harbor in time of peace and may be lying at anchor when war is declared. It thus becomes a belligerent and as regards the neutral the question arises, "How long shall it be permitted to enjoy the hospitality of the neutral?" Should not the rule of the preceding article be applied? It is general in its nature, regulating the sojourn of the belligerent, and as the vessel falls within the definition, it is difficult to see why the rule should not be applied. The Conference so considered it, and declared it to be the duty of the neutral to notify the belligerent to leave within the 24 hours after the declaration of war "or within the time prescribed by local regulations." (Article 13.)

But the convention while prescribing the rule yet tempers the wind to the shorn lamb. The neutral must notify the belligerent to leave within 24 hours. The belligerent should recognize the sovereign command and withdraw, but duty presupposes possibility. If the vessel be damaged so that it cannot put to sea, or if the sea be stormy so that the vessel cannot proceed without danger, the application of the 24 hour rule would work a hardship without any corresponding

benefit. Therefore, Article 14 expressly prolongs the sojourn for these two reasons, with the additional proviso that the vessel must depart as soon as the cause of delay is at an end.

The purpose of the convention is to preserve neutrality, and as merchant vessels take no part in the war, they are not included. Their conduct is peaceable; their intent is gain, not war. For this reason, indeed for a higher reason, vessels of war devoted exclusively to religious, scientific, or philanthropic purposes are not affected by the requirements to depart within 24 hours. The mere statement amounts in this case to a demonstration. A single illustration will suffice. A belligerent hospital ship would be exempt from the regulation.

But it may happen that several belligerent men-of-war are within a neutral harbor at the outbreak of war. It becomes the duty of the neutral to warn them to withdraw. If several vessels belonging to the same belligerent enter, they must likewise be informed of the rule, but, while one vessel may be permitted to remain the full 24 hours, the presence of two vessels may be embarrassing, whereas more than three might endanger the neutrality of the port. Still the neutral, if powerful, may easily meet its obligations and guarantee its neutrality. It is a question after all for a sovereign State to determine, but it is of interest, not merely to the State, but to the Community of Nations. Therefore, the convention specifies that not more than three war vessels of a belligerent may be in a neutral port at one and the same time, in "default of special provision to the contrary in the legislation of the neutral power." (Article 15.)

But the problem may be further complicated by the presence of warships of the two belligerents. The neutral might well be happy with either were the other away, but the presence of both is distinctly embarrassing. Article 2 of the convention expressly forbids every act of hostility including capture within neutral waters, and the danger is as evident as it is real that the belligerent may engage in unneutral conduct. Battleships are inanimate things, masses of iron and

steel, but the commanders are men not unlikely to be influenced by passion and led astray by the supposed interests of their country. Bearing in mind the provisions of the previous article, namely, that three war vessels of a belligerent may be in the harbor at one and the same time, it follows that there may be a fleet of six war vessels, and it is clearly in the interest of the neutral, however powerful, to reduce the number of vessels in its harbor or roadstead. Should the vessels be warned to depart simultaneously a naval battle would be imminent the moment the vessels reached the high seas, and as modern guns have a long range, it is possible, if not probable, that the neutral might suffer from the contest waged so near its shores. It is, therefore, to the advantage of the neutral that the vessels should leave its port at different times so that the chance of combat within its waters or near its shores be lessened. The convention, therefore, prescribes (Article 16) that "a period of not less than 24 hours must elapse between the departure of the ship belonging to one belligerent and the departure of a ship belonging to the other."

The order of departure caused no little discussion and four different systems had their partisans. First, the neutral State should regulate the matter of departure; second, the priority of demand (the Russian proposition) was taken into consideration; third, the weaker vessel should leave first, so that it might escape and not wait for its enemy to come out; fourth, the order of arrival should determine the order of departure. The fourth method commended itself to the Conference, so that the order of departure is determined by the order of arrival, but this rule cannot be so absolute as to admit of no exception, for it may be that the first arrival is unseaworthy and until some repairs are made cannot put to sea without danger. The convention permits the exception where the prolongation of the legal period of sojourning is admitted.

The immunity of private property on the high seas is still a program, not the practice of nations, and it may be that a merchant vessel belonging to one of the belligerents lies peace-

fully at anchor in the harbor of a neutral. The merchantman may not wish to put to sea and is not compelled to. Should, however, its captain determine to leave port, he would be exposed to the grave danger of capture if an enemy war vessel insisted on accompanying him or following shortly in his wake. Therefore, the convention provides that a man-of-war cannot leave the harbor until 24 hours after the departure of an enemy merchantman. The convention does not save the merchantman against his will: it is permitted to depart, but the convention, by retaining the belligerent man-of-war, gives the merchantman a start and a chance to escape if necessity obliges it to put to sea. (Article 16.)

In Article 14 a belligerent is permitted to prolong its sojourn beyond the period of 24 hours on account of damage or stress of weather, and in Article 16 just discussed the possibility of a delay is contemplated. In Article 17 the subject of damage and the repairs permitted to an enemy vessel are considered and determined. The question is one of great delicacy, because if a belligerent be permitted to make extensive repairs, the charge is not without foundation that the neutral territory is being used as a basis of naval operations, for the repairs may be of such a nature as to render a wreck fit for active service. As the vessel cannot remain more than 24 hours in the port, unless expressly permitted by local legislation, it follows that the repairs contemplated are only those absolutely necessary to render the vessel seaworthy. It may well be that what may seem necessary to the belligerent may seem a violation of neutrality to the neutral. Therefore, in case of controversy the neutral shall decide what repairs are necessary and these must be carried out with the least possible delay. This provision is declaratory of international practice. For example, when during the recent Russo-Japanese War Admiral Enguist and his squadron sought refuge at Manila, after the disastrous battle of the Straits, the Secretary of War, at the direction of the President, telegraphed the governor of the Philippine Islands on June 5, 1904, as follows:



Advise Russian admiral that as his ships are suffering from damages due to battle, and our policy is to restrict all operations of belligerents in neutral ports, the President cannot consent to any repairs unless the ships are interned at Manila until the close of hostilities.<sup>1</sup>

In the case of the cruiser *Lena* which arrived at San Francisco in September, 1904, Mr. Adee, acting Secretary of State, advised the Russian ambassador that

If repaired, only such bare repairs can be allowed as may be necessary for seaworthiness and for taking her back to nearest home port, and even such repairs can be permitted only on condition that they do not prove too extensive.<sup>2</sup>

The interpretation therefore of the term "repairs" cannot be doubtful. They must be of such a nature as to make the vessel seaworthy; they may not render it capable of battle, for by permitting the vessel to remain and to fit itself for active service the neutral would insensibly be permitting its port to be used as a basis of hostile operations. This is forbidden by international law. For example, the second rule of the Treaty of Washington provides that

a neutral government is bound not to permit or suffer either belligerent to make use of its ports or waters as the basis of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms or the recruitment of men.

The Conference accepted without discussion the binding effect of the rule in question, but, as on a previous occasion, expressed it in terms of the belligerent instead of the neutral. The belligerent may not make use of the ports; if it does make use of neutral territory, it not only violates neutral sovereignty but renders the neutral responsible to the other belligerent. Therefore, the provision creates at once prohibition against the belligerent and imposes the duty to prevent the forbidden

<sup>1</sup> Naval War College, *Situations of 1905*, p. 168; Moore, *International Law Digest*, Vol. VII, p. 995, and documents there cited.

<sup>2</sup> United States Foreign Relations, 1904, 785, 790; Moore, *International Law Digest*, Vol. VII, pp. 999-1000.

act. The text, however, speaks for itself and should not be presented in a paraphrase. It is as follows:

Belligerent warships may not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews. (Article 18.)

It appears, therefore, that in the absence of special circumstances the belligerent shall not prolong its stay beyond 24 hours; that it can only make repairs necessary to render the vessel seaworthy; that it shall not make use of neutral jurisdiction to replenish or increase military supplies, armaments, or to add to its crews. But improper as all these actions are, there are two matters of greater, indeed of fundamental importance, which the belligerent may not disregard. Without food the men cannot fight, without coal or fuel the vessel cannot operate. An empty stomach and an empty bunker put the vessel out of commission. The desire of one belligerent is to obtain an ample supply of provisions and to fill its bunkers to their utmost capacity. The desire of the other belligerent naturally is that its enemy may obtain neither provisions nor fuel. What attitude should the neutral take? Viewed from his standpoint the sale of provisions and fuel would be profitable to its citizens or subjects, but might involve a violation of neutrality. Therefore, a reasonable and workable rule would seem to be to permit the belligerent to obtain the amount of supplies required by the vessel in time of peace. In this way the standard of peace, not the standard of war, is adopted as the measure. The question of fuel is really more complicated, because the provisions are necessary for the support of the crew and therefore susceptible of innocent use. They do not of themselves necessarily and directly contribute to the warlike purposes. On the contrary, fuel is necessary to enable the vessel to continue its journey and the progress of the vessel and the part it may take in hostilities depends upon the possession of a sufficient quantity of fuel. What quantity therefore should be supplied? From a financial standpoint, the neutral would doubtless be willing to dispose

of his surplus stores, but by so doing he would be adding directly to the fighting strength of the one or the other belligerent. The doctrine of impartiality requires that if the neutral supplies one he must supply the other belligerent, and the neutral nation thus finds itself as the basis of operations, not only of one, but of the other belligerent. The interest of one belligerent would insist that no fuel be furnished. As previously stated the interest of the neutral is that a large supply be furnished. A compromise is inevitable and it would seem that the Conference found the golden mean when it provided that vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. It may be that the vessel is far from home and that the enemy is near, and there is no guarantee that the vessel upon receipt of the fuel will really return to the home port. The neutral, however, is sovereign and may refuse to comply with the request of the belligerent. The belligerent is, however, it would seem, limited to the amount necessary for the particular purpose, unless neutral countries have adopted the full bunker as the unit of supply to be furnished to belligerent vessels. As the neutral is competent to determine the matter, there seems to be no sufficient reason why the belligerent should not be permitted to avail itself of the local legislation. It must be admitted, however, that the solution of the difficulty is a compromise, for supplying food and fuel to belligerents permits them to carry on war. From this point of view the neutral becomes a party to the continuance of the war. Strict and progressive neutrality might well forbid the neutral to supply provisions and fuel to be consumed outside of its territorial jurisdiction. But the proceedings of the conference clearly show that the nations are not ready to adopt this rigid and exacting standard of neutrality. They would no doubt be willing to starve their enemy and keep him in port, but the fear that they may be one day in war and stand in need of provisions gives them pause.

The compromise, therefore, will be regarded unfavorably by those who insist that neutrals shall abstain from all con-

nection with the war and its continuance, whereas the provisions will be more favorably regarded by those nations which heretofore have been lax in neutrality. It must be said, however, that the standard is reasonable in itself, and that its adoption is a matter of no inconsiderable moment. Many of the nations were anxious to prolong their sojourn in a neutral port so as to be able to load the quantity of fuel allowed them. For this reason there is an express stipulation that if local legislation does not permit the belligerent to receive fuel until 24 hours after arrival, the period of their sojourn is prolonged 24 hours. It may be said, finally, that the article regulating this important question of food and fuel provoked long and spirited discussion and was regarded in many respects as the crux of the convention. The importance of the article requires its quotation:

Belligerent warships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.

Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral Power, the ships are not supplied with coal within 24 hours of their arrival, the permissible duration of their stay is extended by 24 hours. (Article 19.)

But supposing that the vessel has been permitted a supply of fuel sufficient to enable it to reach the home port or has filled its bunkers in accordance with local legislation, the question arises: "Should the vessel be permitted to return to the neutral port and repeat the process?" In receiving the provisions and fuel permitted by Article 19, the vessel did not bind itself to return to the home port. The destination is the measure of supply. The vessel may have proceeded but a short way until it met the enemy, or instead of proceeding to the home port it may have sought the enemy. If it should return to the neutral port within a short period, should the neutral repeat the process? International practice answers



the question in the negative, and the convention wisely, reasonably, and justly decided that vessels receiving fuel within a neutral port can not obtain a supply of food or fuel within three months from a port of the same neutral power.

The convention deals with another group of questions likely to present themselves and determines the rules to be applied in such cases. A question much discussed at the Conference, but upon which no agreement was reached, related to the destruction of prizes taken at sea. It does not concern the neutral if a belligerent destroys an enemy merchant vessel, unless it be loaded in whole or part with neutral cargo. It is, however, interested in the treatment accorded to neutral prizes. The situation being different, it may well be that the practice should differ. Capture of enemy property vests the title immediately in the captor, whereas the title to neutral property is only passed by a decision of a competent prize court. If, therefore, an enemy-prize be sunk at sea the captor is practically sinking or destroying his own property; whereas if he sink a neutral prize he may be destroying property which either is not his or which has not been adjudged to be his. Should the validity of the capture be sustained, the neutral has no complaint. Should, however, the capture be set aside the neutral has a right to indemnification. The destruction of the neutral prize may interfere with the evidence to be submitted to the Prize Court, and therefore is objectionable. If the property is destroyed without right the action is wanton. The neutral, therefore, is interested in the safety of the prize. The prize should be taken by the captor to a home port in order to have the validity of the capture passed upon by a Prize Court of his nation. The neutral does not look with favor upon the entry of prize within its jurisdiction, and while Article 21 of the convention does not in express words permit the prize to enter freely, it recognizes that "unseaworthiness, stress of weather or want of fuel or provisions," may justify entrance. The reason for this is simple, namely, that an entry in such a case cannot be considered as the result of design or premeditation. It is in its

nature accidental and necessary. However, the neutral port must not be made a port of entry for prize, and the prize entered must not remain permanently. Otherwise, the neutral port becomes a basis of hostile operations. Therefore, the prize must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew. (Article 21.)

The reason for this action is simple. The prize was only permitted to enter by reason of the existence of certain circumstances. The moment these cease to exist the presence of the prize is unlawful. In the language of law, it is a trespasser and is treated accordingly.

In the absence of what may be called attenuating circumstances, namely unseaworthiness, stress of weather or want of fuel or provisions, the prize cannot enter neutral jurisdiction. If it does, it violates neutrality and the express provision of Article 22 which requires that a neutral power must release a prize brought into one of its ports under any other circumstances than those just specified.

The provisions of Article 23 are seemingly at variance with the two previous articles; for a neutral power is authorized to allow prizes to enter its ports and roadsteads with or without convoy, to await the decision of a Prize Court of the captor country. The advisability of this provision is questionable. If a belligerent cannot conduct the prize to its home country, the prize should be released. A neutral port should not be used as a substitute. Whatever language be used, the fact remains that the neutral port serving as a basis of hostile operations for the capture of a prize commits a hostile act, and the storing of a prize in a neutral port is in aid of a hostile act. This disposition of prize property is unsatisfactory. From another point of view there is, however, much to be said for it. If the belligerent has the right to destroy a neutral prize which cannot be conducted to the home country for

adjudication, the privilege of taking the prize into a neutral port and leaving it there pending adjudication is no slight protection to the prize, and may prevent a resort to the harsh method of destruction. Not only is the vessel saved but the evidence upon which the validity of the act depends is secure and the ends of justice are advanced.

From this point of view the article may prove beneficial but only upon the supposition that the belligerent possesses the right to destroy neutral prize. If he does not possess the right to sink the prize and if it cannot be taken into neutral port the prize would have to be released. It should be said, too, that the article is permissive, not mandatory. The neutral may permit its entrance, it does not need to do so.

Passing now from the group of articles dealing with prize in relation to neutrals, the convention considers the measures to be taken by a neutral power against a belligerent vessel not leaving the port when ordered. In such a case the ship clearly forfeits its claim to protection, for by violating neutrality it becomes a trespasser and may be treated as such, and rendered incapable to take the sea during the war. A vessel which violates the neutrality of the port and refuses to depart does not deserve to be at large. The officers and crew should share the fate of the ship to the extent that they are detained. As they were the cause of the vessel's misfortune, it is only proper that they should not be set at liberty. It is a matter of detail whether they be left in the ship, kept on another vessel or on land. It is, however, an important matter that their liberty of action be controlled by the neutral. The text of Article 24 is clear without further comment:

If, notwithstanding the notification of the neutral Power; a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.

When a belligerent ship is detained by a neutral power, the officers and crew are likewise detained.

The officers and crew thus detained may be left in the ship or kept either on another vessel or on land, and may be subject

to the measures of restriction which it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board.

The officers may be left at liberty on giving their word not to quit the neutral territory without permission.

It will be noted that the neutral possesses the right to proceed against the vessel as indicated in Article 24. It is not obliged to do so.

Such are in general the restrictions placed upon belligerents and the duties imposed upon neutrals in the interest of the nations at large. When a belligerent violates a provision of the convention it is responsible for its action. The neutral is likewise responsible for a failure to perform the duties incumbent upon it. But the duty of the neutral is, as previously stated, not absolute; it is relative and must be conditioned upon the means at its disposal. If it honestly uses its means to prevent a violation of its territory and to fulfill its obligations it has done all that is incumbent upon it to do. Its legal responsibility cannot be determined by its success or failure. The third rule of the Treaty of Washington holds that "a neutral government is bound to exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties." The spirit of the treaty commended itself to the Conference, but it was unwilling to require of the neutral a measure of diligence out of proportion to the means at its disposal. Therefore, the term "due diligence" was interpreted, and, it would seem, properly, to mean such "surveillance as the means at its disposal allow to prevent any violation of the above articles occurring in its waters." (Article 25.) Thus the third rule of the Treaty of Washington was formally incorporated into the Law of Nations.

It has been observed that the convention concerning the rights and duties of neutral Powers and persons in its tenth article provided that "resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act." The twenty-sixth article of the present convention is to the same effect, for



a neutral preventing a violation of its territory cannot be considered as engaging in hostilities in the ordinary sense of the word. The belligerent has committed an unlawful act and resistance to it cannot be unlawful, nor should it be considered as the manifestation of an unfriendly feeling. The belligerent, in accepting the convention, pledged its good faith to the performance of its terms and may be said to consent in advance to any act necessary or proper on the part of the neutral to preserve the convention from violation.

It will be recalled that various articles of the convention established a general rule reserving to neutrals the right to modify it by local legislation. The purpose in establishing the general rule is to render certain the rights and duties of neutrals in naval war. For the reasons which have been advanced, it seems unlikely that neutrals will modify the general rule, but as they possess the right in certain defined cases so to do, the concluding article (Article 27) of the convention has not a little importance, as by pledging the nations to communicate the various "laws, proclamations and other enactments regulating in their respective countries the status of belligerent warships in their ports and harbors," neutrals and belligerents may know in advance the status of neutrality in the members of the family of nations, accepting and applying the convention concerning the rights and duties of neutral Powers in naval warfare.<sup>1</sup>

<sup>1</sup> For the proceedings in detail see *La Deuxième Conférence Internationale de la Paix*, 1907, vol. iii, pp. 460-514, 569-652, 695-735; vol. i, pp. 282-285.

See an excellent article on the Convention, by Charles Cheney Hyde, *American Journal of International Law* (1908) vol. ii.

## CHAPTER XIV.

### AËRIAL WARFARE, THE LIMITATION OF ARMAMENT THE FACTORS THAT MAKE FOR PEACE.

#### 1. AËRIAL WARFARE.

The third article of the second Russian Circular called upon the Conference "to prohibit the throwing of projectiles or explosives of any kind from balloons or by any similar means." The subject was referred to the First Commission under the presidency of M. Beernaert and was considered by the sub-commission likewise under the same able presidency.

The question was discussed at the end of the session of May 29, 1899, and an agreement reached without difficulty. The minute of the meeting is but a page and is as follows:

The President presented for discussion the second part of the third topic: Prohibition of the throwing of projectiles or explosives of any kind from balloons or by methods of a similar nature.

General den Beer Poortugael read the following declaration:

"The Netherland Government has authorized me to support this proposition.

"Does it not seem excessive to authorize the use of infernal machines which appear to fall from the heavens?

"I know well that when one is forced to make war, it is necessary to carry it on as energetically as possible, but that does not mean, however, that every means is permitted.

"At the Conference of Brussels in 1874, it was decided in Article 12, which is almost like Article 11 of the Russian advance program, that the laws of war do not grant belligerents an unlimited power in choosing means of injuring the enemy, and in Article 13 of the final protocol of that conference, the following, among others, are especially forbidden in accordance with this principle: *a.* the use of poison or poisoned arms; *b.* the treacherous murder of persons belonging to the army or nation of the enemy. Now, the progress of science, especially of chemistry, has been such that things hitherto beyond belief are realized

today. We can foresee the use of projectiles or other things filled with deleterious gases, soporific, which, dropped from balloons in the midst of troops, would at once put them out of commission."

General den Beer Poortugael wished to avoid scrupulously every means which approached perfidy and he supported the Russian proposition.

Colonel de Gross de Schwarzhoff said that it was necessary to state in voting for the proposition, that it was not intended to forbid the use of mortars or other cannon which shoot high in the air, but that the words "similar methods" applied only to new means, not yet invented and similar to the use of balloons. Next, it was necessary to declare whether the prohibition, once voted for and accepted by the Governments, should remain in force forever or only for a fixed period, for example, for a period of five years, as was proposed for rifles.

The sub-commission, agreeing with the interpretation of the German delegate, added, to prevent any misunderstanding, the word "new" before the word "methods."

Colonel Gilinsky said that according to the idea of the Russian Government, the different methods of injuring the enemy actually in use, were sufficient.

On this question the sub-commission voted affirmatively, with the exception of the British delegate, and with the reserve of the Roumanian delegate, who limited the agreement to five years.<sup>1</sup>

While the commission was in favor of the restriction, it will be noted that there was an under-current in favor of limiting the prohibition to a period of five years. Aërial warfare was unknown, and the military delegates were willing to restrict it so that they might experiment with balloons in order to see if they could be developed and controlled in such a way as to make them usable in warfare. If such should prove to be the case they were unwilling to renounce this picturesque and efficient means of extermination. The man in arms must be put *hors de combat*, and as long as war is permitted the tendency will be to cling to approved methods of destruction and to invent new and more efficient weapons.

At the fourth meeting of the sub-commission, held June 7, 1899, Captain Crozier proposed, in an admirable and brief

<sup>1</sup>Conférence Internationale de la Paix, 1899, Part II, First Commission, p. 49.

address, a reconsideration of the subject with a view to limiting the restriction to a period of five years. Reconsideration was, however, refused.

In the final discussion of the subject in the first commission, Captain Crozier stated in substance that balloons in vogue cannot be effectively used in war; that their use at present is neither humane nor conformed to the spirit which animates us, because we cannot predict with certainty the place where the projectiles or matter thrown from the balloon will fall, so that innocent populations may be struck as well as combatants, and a church may be destroyed just as easily as a battery. If, however, invention removes these faults and balloons be subjected to control, their use may shorten war and reduce its evils and the expense it entails. From another point of view the limitation is advisable because the proposition should be adopted unanimously. As, however, three powers, Great Britain, France and Roumania, only, accepted the proposition, provided the restriction be limited to five years, the acceptance of the period would remove all objection.

This line of reasoning, simple and convincing from the professional standpoint, resulted in the unanimous adoption of a signed declaration in the following form:

The Contracting Powers agree to prohibit, for a term of five years, the launching of projectiles and explosives from balloons or by others new methods of a similar nature.

The present declaration is only binding on the contracting powers in case of war between two or more of them.

It shall cease to be binding from the time when, in a war between the Contracting Powers, one of the belligerents is joined by a noncontracting power.

As the declaration was limited to a period of five years it expired in 1904, and the Russian Government properly and wisely placed its reconsideration upon the program for the Second Conference. The Belgian Delegation proposed the renewal of the declaration, and the session of August 7, 1907, of the First Sub-Commission of the Second Commission was devoted to its discussion.



The renewal was agreed to for the period of five years, but the vote was far from unanimous,<sup>1</sup> and it was noticeable that Russia, its proposer in 1899, voted against it in 1907. Russia took the attitude of Captain Crozier in 1899 that the science of ballooning is an unknown quantity, and that it was impossible to forecast its future.

Without touching these questions a trifle premature and perhaps a little imaginary, we may extract from the proposed prohibition one which may permanently be adopted, namely, the prohibition to drop projectiles from balloons upon undefended towns, villages and habitations.<sup>2</sup>

The Russian delegation proposed this as an amendment to Article 25 of the Laws and Customs of Land Warfare of 1899. Italy proposed an amendment of a similar nature and as a result of an exchange of views it was decided to amend Article 25 in the manner proposed by Russia and Italy, by inserting in the text the following phrase: "by whatever means." The article thus amended reads:

The attack or bombardment, *by whatever means*, of towns, villages, dwellings, or buildings which are undefended is prohibited.

The happy wording of this amendment is due to the French Delegation<sup>3</sup> and the result of it is that bombardment by balloons, if and when possible, is to be controlled and regulated as other bombardments.

But to return to the Declaration of 1899 and its subsequent fate. The failure to call a conference within five years resulted in the expiration of the declaration by the mere operation of time. To prevent a recurrence of this, Sir Edward Fry proposed in the plenary session of the Conference of August 14,

<sup>1</sup> 29 for (Germany and Roumania on condition of unanimity): 6 against (Argentina, Spain, France, Montenegro, Persia, Russia); 10 countries did not respond to the roll call.

<sup>2</sup> Speech of M. Tcharykow, *La Deuxième Conférence Internationale de la Paix*, 1907, Vol. III. 2d Commission, 1st Sub-Commission, p. 151.

<sup>3</sup> *La Deuxième Conférence Internationale de la Paix*. 1907, Vol. III, 2d Commission, Second Session, p. 16.

1907, that instead of five years, the declaration shall remain in force until the close of the Third Peace Conference. This amendment was accepted and in final form the declaration reads as follows:

The Contracting Powers agree to prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature.

The present Declaration is only binding on the Contracting Powers in case of war between two or more of them.

It shall cease to be binding from the time when, in a war between the Contracting Powers, one of the belligerents is joined by a non-Contracting Power.

It is to be regretted that the inhibition was voted with any limitation of time and it is hardly less a subject of regret that some of the greatest and most progressive nations<sup>1</sup> voted against the declaration limited as it is to a few years. The status of the question is thus that a majority of the powers bind themselves for an infinitesimal period of time to refrain from launching projectiles from balloons, because it is not yet demonstrated that balloons can be successfully used for military purposes; that experiments will be made in all quarters of the world to perfect the balloon and render it manageable. If such endeavor be successful the balloon will be no longer a toy but a means of destruction, and the nations of the earth will carry war into the air unless forbidden by the conscience of the world.

In the debate upon the renewal of the declaration Lord Reay asked

if it was not enough to have two elements in which the nations might give free scope to their animosities and settle their quarrels without adding a third?

<sup>1</sup> Germany, Argentine, Spain, France, Montenegro, Persia, Roumania, Russia. It is disquieting that the following States failed to sign the declaration on or before June 30, 1908, the last day for signing the declaration: Germany, Chili, Denmark, Spain, France, Guatemala, Italy, Japan, Mexico, Montenegro, Nicaragua, Paraguay, Roumania, Russia, Servia, Sweden, Venezuela. See Vol. II, p. 531.

Continuing he said:

In the domain of armaments we know how difficult it is to apply a remedy, the evil being so widespread that it is difficult to know where to begin. Happily in the domain of aerial navigation the case is different and it does not seem impossible to prevent the evil because no nation has pushed so far ahead that it cannot retrace its steps.

The present Conference will not, I am sure, fail to recognize that we would render a great service to humanity and the cause of peace we pursue in holding the people back from this fatal precipice. In addition, financial considerations require us to do our utmost to check an increase of military and naval expenses which already constitute a crushing burden for all nations, an increase which will not fail to be felt if it become necessary to add to the budgets an item for the development of aërostatics.

I am firmly convinced that the Conference must act while there is yet time. Of what use will our efforts be to lessen the suffering caused by war if we call into being a new scourge, more terrible in its effects than the instruments whose field of action we seek to limit.<sup>1</sup>

The slaughter of our kind proceeds by land and sea and the Conference opened up a new element, the air, so that the bowels of the earth—unless infected by mines—are the only refuge of peace.

## 2. LIMITATION OF ARMAMENT<sup>2</sup>

After having considered the various conventions and declarations concerning warfare, whether it be on land or sea, or whether it be extended to the air, as seems probable, we are now in a position to consider the question of disarmament in its larger aspects. It will be recalled that the First Conference owed its origin to the Russian rescript of August 24-12, 1898, in which the Czar declared that

the maintenance of general peace, and a possible reduction of the excessive armaments which weigh upon all nations, present themselves in the existing condition of the whole world, as the ideal toward which the endeavors of all Governments should be directed.

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. III, Second Commission, First Sub-Commission, p. 153.

<sup>2</sup> For various projects and expressions of views on this important subject, see *Actes et Documents relatif au Programme de la Conférence de la Paix*, published by order of the Dutch Government (1899).

The burden imposed by universal armament and its constant increase seems to have been the reason for the convocation of the First Conference, and although the second Russian Circular, dated January 11, 1899 (December 30, 1898), enumerated other subjects for discussion and modified considerably the position taken regarding armaments, the subject of their limitation figured prominently in the circular and the program which it proposed, as appears from a perusal of sections (a) and (b) and subjects 1 to 4 of the circular, already quoted in full.<sup>1</sup>

It was inevitable, therefore, that the question of armaments and their possible limitation would be the subject of profound discussion at the Conference, and it will be recalled that the matters contained in the paragraphs enumerated in the second circular were referred to the first commission of the Conference of 1899. As the results reached by the First Commission have already been set forth, it is unnecessary to repeat or to restate them in this connection.<sup>2</sup> It is sufficient to call attention to the general arguments advanced against the feasibility of any limitation of armaments, however slight, in the present state of affairs.

The discussion of the subjects mentioned in the rescript was largely technical, and technical reasons justified the refusal to prohibit the use of new kinds of firearms, new explosives, more powerful powders than those in use, the employment of submarine torpedo-boats or plungers, or the construction in the future of vessels with rams. The proposals not to increase for a fixed period land and naval forces, and, as a consequence thereof, not to increase military or naval budgets, were questions of policy not to be accepted or rejected upon purely technical grounds, for the nations might have agreed to these proposals had any limitation seemed consistent with national policy and development. We are familiar with the result; we may not be so familiar with the process of reasoning by which the negative result was reached. It is therefore advisable

<sup>1</sup> For text see pp. 44-47, *supra*.

<sup>2</sup> See Chapter II, pp. 35, 54, *supra*.



to quote at some length the address of Colonel Gilinsky, charged with the presentation of the Russian proposal for the limitation of armaments; the reply of Colonel Gross von Schwarzhoff, the German Delegate, who voiced the opposition to the proposal, and the address of M. Bourgeois, which expressed sympathy with the idea and secured the acceptance of the resolution keeping the subject open for future discussion and solution.<sup>1</sup>

In introducing the Russian proposals, Colonel Gilinsky said that the Russian Government had two objects in view: the first, humanitarian, sought to lessen the possibility of war and to remove its evils and calamities as far as possible; the second, founded upon economic considerations, aimed to diminish as far as possible the enormous weight of pecuniary charges which nations are obliged to meet for the support of their armies in times of peace. Omitting references to the projects tending to diminish the possibility of war, Colonel Gilinsky asked

whether the peoples represented at the Conference would be entirely satisfied if nothing whatever was done at the Conference to lift this heavy load which they were bearing in time of peace, and which was so enormous that open war had been considered almost preferable to the indefinite continuance of such unbearable conditions.

Colonel Gilinsky proceeded to examine the argument that the expenditure of money for the support of the army was a benefit to the country because the money was kept in the country; and he pointed out the difficulty of setting a limit to continued increase of armaments on the part of any country which considered itself in danger, except by virtue of an international agreement. He claimed that the Russian proposals were not in themselves novel, since they simply extended over the entire world principles which had been accepted in many of the countries here represented. In Germany the strength of the army was fixed every seven years; in Russia the military budget was fixed for a term of five years. The term might be shorter if the Conference so decided.

<sup>1</sup> The translation of the various addresses is taken from Mr. Holls' Peace Conference at The Hague, and the abstracts are either quoted or paraphrased from Mr. Holls' account.

We suggest nothing new, he remarked, except the decision and the courage to ascertain the facts, and to say that the time has come to call a halt. Russia proposes this to you: she invites you to set a limit to the further increase of military forces at a moment when she herself is far from having attained the maximum of this development, for we Russians do not call upon more than twenty-six to twenty-nine and one-half per cent of our young men to enter the ranks, whereas other States require twice as great a percentage or even more. There is thus no selfish interest in the Russian proposal. It is a purely humanitarian idea, and a proposition with an economic feature which you can entertain and discuss in absolute confidence.<sup>1</sup>

The Colonel expressed the hope that the questions be carefully and freely discussed, and stated that disarmament was neither practicable nor desirable until an agreement had been reached regarding a limitation of present armaments.

Colonel Gross von Schwarzhoff then made his address in reply. He first spoke concerning the remarks of General Den Beer Poortugael who advocated the Russian propositions.

I can hardly believe that among my honored colleagues there is a single one ready to state that his sovereign, his government, is engaged in working for the inevitable ruin, the slow but sure annihilation of his country. I have no mandate to speak for my honored colleagues, but so far as Germany is concerned, I am able completely to reassure her friends and to relieve all well-meant anxiety. The German people is not crushed under the weight of charges and taxes,—it is not hanging on the brink of an abyss; it is not approaching exhaustion and ruin. Quite the contrary; public and private wealth is increasing, the general welfare and standard of life is being raised from one year to another. So far as compulsory military service is concerned, which is so closely connected with those questions, the German does not regard this as a heavy burden, but as a sacred and patriotic duty to which he owes his country's existence, its prosperity, and its future.

Taking up Colonel Gilinsky's propositions, he continued:

I return to the propositions of Colonel Gilinsky, and to the arguments which have been advanced, and which to my mind are not quite consistent with each other. On the one hand, it is feared that excessive armaments may bring about war; on the

<sup>1</sup> Holls' Peace Conference, pp. 74-75.

other, that the exhaustion of national wealth will make war impossible. As for me, I have too much confidence in the wisdom of sovereigns and nations to share such fears. On the one hand, it is pretended that nothing is asked but things which have existed for a long time in some countries, and which therefore present no technical difficulties; on the other hand, it is said that this is truly a very difficult question, the solution of which would require a supreme effort. I am entirely of the latter opinion. We shall encounter insurmountable obstacles—those which may be called technical in a somewhat wider sense of the term. I believe that the question of effectives cannot be regarded by itself alone, disconnected from a number of other questions to which it is quite subordinated. Such questions, for instance, as the state of public instruction, the length of time of active military service, the number of established regiments, the effectives of each army unit, the number and duration of the drills or military obligations of the reserves, the location of the different army corps, the railway system, the number and situation of fortified places. In a modern army all of these belong together and form the national defense which each people has organized according to its character, its history, and its traditions, taking into account its economical resources, its geographical situation, and the duties incumbent upon it. I believe that it would be very difficult to substitute for such an eminently national task an international convention. It would be impossible to determine the extent and the force of one single portion of this complicated mechanism. It is impossible to speak of effectiveness without taking into account the other elements which I have enumerated in a most incomplete manner. Furthermore, mention has been made only of troops stationed in the larger cities, and with this Colonel Gilinsky agrees; but there is territory which may not be a part of the particular country, but which may be so near that troops stationed there would certainly participate in a continental war. And the countries over sea—how could they ever admit a limitation of their armies if colonial troops, which alone menace them, are not to be affected by this convention?

Gentlemen, I have simply indicated from a general point of view some of the reasons which, according to my view, prevent the realization of the desire which is surely shared by us all, to arrive at an agreement on the question before us. Permit me to add a few words regarding the special situation of the country which I have the honor to represent in this body. In Germany the number of effectives is fixed by an agreement between the Government and the Reichstag, and in order not to repeat every year the same debates, the number was fixed for seven and later for five years. This is one of the arguments advanced by Colonel Gilinsky when he declared that he asks of us nothing

new. At first sight, gentlemen, it would seem that such an arrangement might facilitate our adherence to a similar proposition; but apart from the fact that there is a great difference between a municipal law and an international convention, it is precisely our "quinquennate" which prevents us from making the proposed agreement. There are two reasons against it: first, the international period of five years would not synchronize with our national period, and this would be a grave obstacle; furthermore, the military law which is today in force does not fix a special number of effectives, but on the contrary it provides for a continuous increase up to 1902 or 1903, in which year the reorganization begun this year will have been terminated. Up to then it would be impossible for us to maintain, even for two consecutive years, the same number of effectives.<sup>1</sup>

At a later date, M. Bourgeois expressed his dissatisfaction with the negative results of the discussion as embodied in the report of the committee and insisted that something of a positive nature be accomplished:

I have read carefully the text of the conclusions adopted by the sub-committee. This report shows with great precision and force the difficulties now in the way of the adoption of an international treaty for the limitation of effectives. It was for the purpose of examining these practical difficulties that the subject was referred to this sub-committee, and no one can think of criticising the manner in which it has accomplished its task. But this first committee of the Conference should consider the problem presented by the first paragraph of the circular of Count Mouravieff from a point of view more general and more elevated. We certainly do not wish to remain indifferent to a question of principle presented to the civilized world by the generous initiative of His Majesty the Emperor of Russia. It seems to me necessary that an additional resolution should be adopted by us, to express more clearly the sentiment which animated the last speaker, and which makes us all hope and wish that the work here begun may not be abandoned. The question of principle may be stated very simply. Is it desirable to limit the military charges which now weigh upon the world?

I listened with great care in the last session to the remarkable speech of Colonel von Schwarzhoff. He presented with the greatest possible force the technical objections which, according to his view, prevented the committee from adopting the propositions of Colonel Gilinsky. It did not, however, seem to me that

<sup>1</sup> La Conférence Internationale de la Paix, 1899, part II, First Commission, pp. 27-28; Holls' Peace Conference, pp. 76-80.



he at the same time sufficiently recognized the general ideas in pursuance of which we are here united. He showed us that Germany is easily supporting the expense of its military organization, and he reminded us that notwithstanding this, his country was enjoying a very great measure of commercial prosperity. I belong to a country which also supports readily all personal and financial obligations imposed by national defense upon its citizens, and we have the hope to show to the world next year that we have not gone back in our productive activity, and have not been hindered in the increase of our financial prosperity. But General von Schwarzhoff will surely recognize with me that if in his country, as well as in mine, the great resources, which are now devoted to military organization, would, at least in part, be put to the service of peaceful and productive activity, the grand total of the prosperity of each country would not cease to increase at an even more rapid rate. It is this idea which we ought not only to express here among ourselves, but which, if possible, we should declare before the public opinion of the world. It is for this reason that if I were obliged to vote on the question put in the first paragraph of the proposition of Colonel Gilinsky, I would not hesitate to vote in the affirmative.

Besides, we have hardly the right here to consider only whether our particular country supports the expense of armed peace. Our duty is higher. It is the general situation of all nations which we have been summoned to consider. In other words, we are not only to vote on questions appertaining to our special situation. If there is a general idea which might serve to attain universal good, it is our duty to emancipate ourselves. Our object is not to form a majority and a minority. We should refrain from dwelling upon that which separates us, but emphasize those things upon which we are united. If we deliberate in this spirit, I hope we shall find a formula which, without ignoring the difficulties which we all understand, shall at least express the thought that a limitation of armaments would be a benefit for humanity, and this will give to the governments that moral support which is necessary for them, if they are to still further pursue this noble object.

Gentlemen, the object of civilization seems to us to be to abolish more and more the struggle for life between men, and to put in its stead an accord between them for the struggle against the unrelenting forces of matter. This is the same thought which, upon the initiative of the Emperor of Russia, it is proposed that we should promote by international agreement. If sad necessity obliges us to renounce for the moment an immediate and positive engagement to carry out this idea, we should at least attempt to show public opinion that we have sincerely examined the problem presented to us. We shall not have labored in vain if in a formula of general terms we at least indicate the

goal to be approached, as we all hope and wish, by all civilized nations.<sup>1</sup>

Mr. Bourgeois proposed the following resolution which was unanimously adopted:

The committee considers that a limitation of the military charges which now weigh upon the world is greatly to be desired in the interests of the material and moral welfare of humanity.

As was to be expected, the attitude of the United States was sympathetic, but pursuant to specific instructions from the Secretary of State, the American Delegation took but little part in the proceedings.

In accordance with these instructions the American Delegation drew up a statement, already quoted,<sup>2</sup> expressing its sympathy and views on the subject, which was presented and read at the last meeting of the First Commission, on July 17, 1899.<sup>3</sup>

The advocates of the limitation of armaments were dissatisfied with the resolution proposed by M. Bourgeois and adopted by the Conference, because they had hoped for a conventional agreement by which the nations would bind themselves either to reduce armaments or to maintain the present status unchanged for a period of years. It cannot be denied that the Conference failed to reach an agreement, other than an agreement to disagree on this subject; and yet we should not overlook the fact that the question of armaments was elaborately and carefully discussed for the first time in an international conference called for this express purpose. In this way the subject was given an importance and dignity which it previously had not enjoyed, and it is not too much to say that the mere presentation and discussion of the subject place its opponents upon the defensive. Some subjects are

<sup>1</sup> La Conférence Internationale de la Paix, 1899, part II, pp. 33-34, Holls' Peace Conference, pp. 87-90.

<sup>2</sup> P. 58, *supra*.

<sup>3</sup> La Conférence Internationale de la Paix, part II, pp. 39-40; Holls' Peace Conference, pp. 91-92.

dangerous to discuss, and a hope of ultimate success is not excluded when the nature of the objections and the arguments by which they are sustained are set forth.

If the result of the discussion was unsatisfactory to the pacifists, the discussion itself was very displeasing to its opponents, and it is understood that several nations were unwilling to participate in the Second Conference if the subject figured in the program, or to take part in the proceedings of the Conference if the subject were brought forward. One sure of his cause is not unwilling to discuss it, and the fear to consider shows upon what an insecure basis the argument rests. Other nations, on the contrary, insisted that the question of armaments should be included in the program and, as this was not done, reserved their right as sovereign nations to present the matter to the Conference for discussion. The Prime Minister of Great Britain, the late Sir Henry Campbell-Bannerman, was, as is well-known, an opponent of war and a partisan of the limitation of armaments,<sup>1</sup> and, pursuant to his instructions, the British Delegation presented the matter at the fourth plenary session of the Second Conference, August

<sup>1</sup> In opening the Interparliamentary Union of London, July 23, 1906, Sir Henry said:

"I am not despondent about the future. In the first place, it is only a few short years since peace was a wanderer on the face of the earth, liable at any moment to be trampled upon and spitefully used; and if wars and preparations for wars have not ceased since she found a rest for the sole of her foot at The Hague, remember that time is needed for the growth of confidence in the new order of things, and that allowance must be made for the momentum of the past which thrusts the old régime forward upon the new.

"Remember, too, that the people are on your side. I know it is said that democracy is as prone to war as any other form of government. But democracy, as we know it, is a late comer on the world's stage, where it has barely had time to become conscious of its characteristic powers, still less to exert them effectively in its external relations.

"The bonds of mutual understanding and esteem are strengthening between the peoples, and the time is approaching when nothing can hold back from them the knowledge that it is they who are the victims of war and militarism; that war in its tawdry triumphs scatters the fruits of their labor, breaks down the paths of progress, and turns the fire of constructive energy into a destroying force."

17, 1907. Our accomplished Secretary of State, Honorable Elihu Root, is an outspoken partisan of the judicial and therefore peaceful settlement of international controversies, and he specifically reserved the right in a note, dated June 7, 1906, to present the question of disarmament to the Conference.<sup>1</sup> It is, therefore, a matter of congratulation that, to use the happy expression of the late John Richard Green, "two nations, but one people," namely, the English-speaking world, presented and urged the question of the limitation of armaments upon the Second Conference.

It is well-known that the subject of the limitation of armaments did not appear in the official program prepared by Russia and approved by the nations invited to the Conference, and an examination of the proceedings of the Conference shows that the subject was not presented to, nor was it discussed in any commission. Outside of the Conference, however, in season and out of season, Sir Edward Fry, Mr. Choate, M. Bourgeois and the Baron d'Estournelles de Constant discussed the question, and the initiative taken by Sir Edward Fry was with the knowledge, consent and outspoken approval of the American and French Delegation. The subject was uppermost in the hearts and minds of many of the Delegates, and those opposed to the prolonged discussion of 1899 nevertheless consented to its presentation to the Conference at its plenary session of August 17. On this occasion Sir Edward Fry, both by religion and practice a follower of William Penn, delivered an address in which, after referring to the Russian proposition concerning armaments in the program of the First Conference, the recommendation of the First Conference, and the memorandum of Count Mouravieff of August, 1898, in which he deplored the economic evils incident to excessive armaments, he continued as follows:

These words, so eloquent and so true when they were first uttered, are today still more forcible and more true. For, Mr.

<sup>1</sup> See Chapter III, pp. 103-104, where the material portion of this note is quoted. See also Mr. Root's Instructions to the American Delegation, Vol. II, p. 187.



President, since that date military expenditure upon armies as well as upon navies has considerably increased. Thus, according to the most exact information which I have received, this expenditure reached in 1898—that is to say in the year which immediately preceded the First Conference at The Hague—a total of more than £251,000,000 for the countries of Europe, with the exception of Turkey and Montenegro (regarding which I have no information), the United States of America, and Japan; while in the year 1906 the similar expenditure of the same countries exceeded a total of £320,000,000.

It will thus be seen that in the interval between the two Conferences annual military expenditure has been augmented by the sum of £69,000,000, or more than 1725 millions of francs, which is an enormous increase. Such is this excessive expenditure which might be employed for better ends; such, Mr. President, is the burden under which our populations are groaning; such is the Christian peace of the civilized world in the twentieth century. I will not speak of the economic aspect of the question, of the great mass of men who are compelled by these preparations for war to leave their occupations and of the prejudicial effect of this state of things upon the general prosperity. You know this aspect of the question better than I do.

I am, therefore, quite sure that you will agree with me in the conclusion that the realization of the desire expressed by the Emperor of Russia and by the First Conference would be a great blessing for the whole of humanity. Is this desire capable of being realized? This is a question to which I cannot supply a categorical answer. I can only assure you that my government is a convinced supporter of these high aspirations and that it charges me to invite you to work together for the realization of this noble desire.

In ancient times, Mr. President, men dreamed of an age of gold which had existed on earth in the distant past; but in all ages and among all nations poets, sibyls, prophets, and all noble and inspired souls have always cherished the hope of the return of this golden age under the form of the reign of universal peace.

*Ultima Cumæi venit jam carminis ætas,  
Magnus ab integro sæculorum nascitur ordo,  
Jam redit et virgo, redeunt Saturnia regna.*

Such was the dream of the Latin poet for his age; but today the sense of the solidarity of the human race has more than ever spread over the whole world. It is this sentiment that has rendered possible the convocation of the present Conference; and it is in the name of this sentiment that I request you not to separate without having asked that the Governments of the world should devote themselves very earnestly to the question of the limitation of military charges.

My government recognizes that it belongs to the duty of every country to protect itself against its enemies and against the dangers by which it may be threatened, and that every Government has the right and the duty to decide what its own country ought to do for this purpose. It is, therefore, only by means of the good will, the free will, of each Government, acting in its own right, for the welfare of its own country, that the object of our desires can be realized.

The Government of his Britannic Majesty, recognizing that several Powers desire to restrict their military expenditure, and that this object can only be realized by the independent action of each Power, has thought it to be its duty to inquire whether there are any means for satisfying these aspirations. My Government has, therefore, authorized us to make the declaration:

The Government of Great Britain will be prepared to communicate annually to Powers which would pursue the same course the program for the construction of new ships of war and the expenditure which this program would entail. This exchange of inclination would facilitate an exchange of views between the Governments on the subject of the reductions which it might be possible to effect by mutual agreement. The British Government believes that in this way it might be possible to arrive at an understanding with regard to the expenditure which the States which should undertake to adopt this course would be justified in incorporating in their estimates.

In conclusion, therefore, Mr. President, I have the honor to propose to you the adoption of the following resolutions:

The Conference confirms the resolution adopted by the Conference of 1899 in regard to the limitation of military charges; and, in view of the fact that military charges have considerably increased in almost all countries since that year, the Conference declares that it is highly desirable that the Governments should resume the serious study of this question.<sup>1</sup>

At the conclusion of Sir Edward's address, M. de Nelidow read the following letter from Mr. Choate on behalf of the American Delegation:

In the course of the negotiations which preceded the present Conference the government of the United States considered it to be its duty to reserve the right to bring forward here the important subject of the limitation of armaments, in the hope that that might advance in some small degree the lofty conception which inspired the Emperor of Russia in his first appeal.

While regretting that more progress in the direction indicated

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, pp. 90-92.

by His Imperial Majesty cannot be made at this moment, we are happy to think that there is no intention on the part of the nations to abandon His Majesty's endeavors, and we request to be allowed to express our sympathy for the views expressed by His Excellency the first delegate of Great Britain, and to support the proposal which he has just made.<sup>1</sup>

M. de Nelidow also read a letter from the first Spanish Delegate, Señor de Villa Urrutia, stating that the Spanish Government had reserved the right to discuss the question of the limitation of armaments submitted to the former Conference by the Czar; that he regretted circumstances had not permitted the nations to follow this noble idea, and that he desired to give expression to the sympathies of the Spanish Government with the views expounded by Sir Edward Fry, and to the hope that the endeavors of all the nations in this sense might one day be crowned with success.<sup>2</sup>

The President further read a joint communication from the Delegations of Argentine and Chile informing the Conference that by virtue of the Treaty of May 28, 1902, and the Complementary Agreement of January 9, 1903, a part of the fleets of these two countries was dismantled; that the armed cruisers in course of construction on the account of the respective Governments were sold upon the docks, and that the countries agreed for a period of five years to abstain from the acquisition of vessels of war.<sup>3</sup>

Recalling the prominent part that M. Bourgeois took in the discussion of the question in the First Conference, it was peculiarly appropriate that he should be heard on this occasion, and it was a source of pleasure to the partisans of the limitation of armaments when M. Bourgeois rose and said:

In the name of the French Delegation I declare our support (*je déclare appuyer expressément*) of the proposal formulated by Sir Edward Fry and upheld by our colleagues of the United States of America.

The first delegate of the French Republic, remembering that

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, pp. 92-93.

<sup>2</sup> Ibid., p. 93.

<sup>3</sup> Ibid., p. 93.

he was in 1899 the initiator of the *vœu* of the first Conference, will perhaps be allowed to express the confident belief that between now and the meeting of our next assembly the study to which the Conference invites the Governments in the name of humanity will be resolutely pursued.<sup>1</sup>

The proceedings were closed by the following address from M. de Nelidow:

The eloquence of His Excellency the First British Delegate and the proposal with which it concluded as well as the communications with which I have just acquainted you, cannot, it seems to me, fail to meet with a sympathetic reception on our part. The idea of diminishing charges which weigh upon the populations owing to the fact of wars, by seeking the means of putting an end to the progressive increase of armaments on land and on sea, constituted the chief motive of the initiative taken by the Emperor of Russia in order to bring about the meeting of the Peace Conference. This thought was, so to speak, the corner-stone of that action. It formed the starting-point of the Russian Circular of August 12 (24), 1898, and was placed at the head of the program which the Cabinet of St. Petersburg proposed to the Powers in its Circular of December 30, 1898 (January 11, 1899). All the Governments gave their adherence, and the Conference, from the outset, had to occupy itself with a proposal of the Russian delegation which aimed at preventing the increase of armaments.

Contact with reality, however, was not long in revealing all the practical difficulties which this generous thought involved when the question of applying it arose. In the committee which was entrusted with the consideration of the subject very keen differences of opinion soon broke out, and the debates assumed such a character that, instead of the desired understanding, there was a danger of a disagreement which might have proved fatal to the rest of the labors of the Conference. It had to be acknowledged that the question was not ripe, that it required further study on the part of the different Governments at home; and it was in this sense that, after having unanimously adopted the resolution which has just been recalled by the First Delegate of Great Britain, the committee expressed the desire that the governments, taking account of the proposals made to the Conference should enter upon a study of the possibility of an understanding with regard to the limitation of armed forces on land and on sea and of military estimates.

But here once more practical experience was not destined to correspond with the ideal nature of the desire (*vœu*). As I

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, p. 93.



have just intimated, only two States—Argentina and Chile—have been able to give effect to that *vœu* by concluding a Convention of Disarmament, which I have had the honor of reading to you. The majority of the Powers of Europe had other preoccupations. Scarcely had the Conference terminated its labors when troubles which arose in an Empire of Eastern Asia obliged the Governments to intervene with armed force. A short time afterwards one of the great European Powers found itself engaged in South Africa in a struggle which necessitated on its part a great military effort. Finally, during these last years, the Far East was the theater of a gigantic war, the liquidation of which is barely finished. Need I also mention the colonial struggles and diplomatic difficulties which may have temporarily compelled one Power or another to increase its armaments? The result was that the Governments, far from having been able to occupy themselves, in conformity with the desire expressed by the Conference, with the means of limiting armaments, had, on the contrary, to increase their armaments to an extent which has just been shown you by the figures adduced by Sir Edward Fry.

It was in consideration of these circumstances, gentlemen, that the Russian Government this time refrained from placing the limitation of armaments upon the program of the Conference which it proposed to the Powers. To begin with, it considered that this question was not ripe for being discussed with fruitful results. In the second place, it did not desire to provoke discussions which, as the experience of 1899 showed, could only, in opposition to the aim of our common endeavors, accentuate a disagreement among the Powers by giving occasion for irritating debates. The Russian Government, for its part, was determined not to take part in such discussions, and it knew that this was likewise the determination of some other great Powers.

Yet the seed sown at the time of the First Conference has germinated independently of the action of the Governments. A very emphatic movement of public opinion has arisen in different countries in favor of the limitation of armaments, and the Governments, whose sympathies for the principle have not diminished, in spite of the difficulties of carrying it out, find themselves confronted with manifestations which they are not in a position to satisfy. Thus it is, gentlemen, that the British Government, giving expression to its own preoccupations, and making itself the organ of public feeling, evinced its intention of nevertheless calling the attention of the Powers assembled in Conference at The Hague to the question of the limitation of armaments, and that its First Delegate has just brought before us the *vœu* which the cabinet of London would like to see adopted by us.

I for my part am unable to discover any other means of evincing the interest which the Powers take in this question. If the question was not ripe in 1899, it is not any more so in 1907. It has not been possible to do anything on these lines, and the Conference today finds itself as little prepared to enter upon them as in 1899. Any discussion which should in itself prove sterile could only be harmful to the cause which was in view by accentuating differences of opinion on questions of fact, while there exists unity of general intentions which might one day meet with their realization. It is for this reason, gentlemen, that the proposal now made to us by the British Delegation, to confirm the resolution adopted by the Conference of 1899 by formulating anew the desire which was then expressed is what best corresponds with the present state of the question and with the interest which we all have in seeing it directed into a channel where the unanimity of the Powers could alone constitute a guarantee of its further progress. And it will be an honor for the Second Peace Conference to have contributed to this end by its immediate vote.

I therefore can only applaud the English initiative, and recommend you to unite in receiving the resolution, as it has been proposed to us by Sir Edward Fry, with unanimous acclamations.<sup>1</sup>

The resolution was unanimously accepted without being put to a vote. It was said at the time, and it has no doubt been repeated wherever the question of armaments has been discussed, that the proceedings of the Conference on this occasion were farcical, and that the limitation of armaments was quietly, promptly—the proceedings lasted but twenty-five minutes—and impressively laid to rest. The reverse, however, is true. The admirable address of Sir Edward Fry is included in the proceedings of the Conference; the resolution which he proposed appears in the Final Act of the Conference, and the question is again re-submitted to the further consideration and judgment of enlightened and progressive public opinion. The question was not buried, as the advocates of armament had proposed; it goes forth with the approval of two Conferences, and there can be no doubt that it will be reconsidered in future conferences if public opinion insists that it be reconsidered. An international conference at The Hague is not a popular assembly, but the delegates are in no uncertain measure servants of the people, and if international

<sup>1</sup>La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, vol. I., pp. 94-95.

opinion declare in its favor, there can be no doubt that Governments dependent upon it will consider the question and solve it, if such be the desire of the international community.

There is no doubt that disarmament might be accomplished by a universal treaty binding the nations to disband their armies and dismantle their navies; but it is unreasonable in the present state of affairs, to suppose that the countries of the world will agree to such a drastic not to say Utopian measure. It is perhaps too much to hope that any one nation will disband its forces, or that any two nations will follow permanently the example of Argentine and Chile in the absence of a general agreement. The experience, however, of Great Britain and the United States in limiting armed vessels in the Great Lakes to the minimum required for police duty, shows that little or no armament is as consistent with national dignity as it is with international peace.<sup>1</sup> It is not unreasonable to propose that armies and navies shall bear some fixed proportion to the population of the respective countries, or that by mutual agreement the nations might enter into a treaty to maintain for a definite period of years their land and naval forces at the present size and standard of efficiency. The relative equality would not be disturbed by this last method.

<sup>1</sup> The naval force to be maintained upon the American lakes, by His Majesty and the Government of the United States, shall henceforth be confined to the following vessels on eachside; that is—

On lake Ontario, to one vessel not exceeding one hundred tons burden, and armed with one eighteen-pound cannon.

On the upper lakes, to two vessels, not exceeding like burden each, and armed with like force.

On the waters of Lake Champlain, to one vessel not exceeding like burden, and armed with like force.

All other armed vessels on these lakes shall be forthwith dismantled, and no other vessels of war shall be there built or armed.

If either party should hereafter be desirous of annulling this stipulation, and should give notice to that effect to the other party, it shall cease to be binding after the expiration of six months from the date of such notice.

The naval force so to be limited shall be restricted to such services as will, in no respect, interfere with the proper duties of the armed vessels of the other party. Agreement between Great Britain and the United States, concluded in April, 1817 (Statutes at large, Vol. 8, p. 231).

The Conference, however, was unwilling to take the step, however desirable it may seem from the economic standpoint, leaving out other and higher considerations. It is safe to assume that armies and navies will remain as long as nations resort to force for the settlement of international disputes, and it is difficult to conceive a time or place in which an armed force will not be required at least for police duty.

Although enthusiasts propose disarmament or the limitation of armaments in the present state of the world's affairs, public opinion does not seem ripe for either proposal. Without venturing a criticism of those with whose aims I deeply sympathize, I believe that more real progress would be made towards disarmament or the limitation of armaments if a sane and serious attempt were made to eliminate the causes that ordinarily produce war, or if a satisfactory substitute for war were matured so reasonable in itself that it would be unreasonable not to accept it as a substitute. Good offices and mediation, the arbitration and judicial settlement of international controversies would render the resort to arms less frequent, and if by practical experience nations found that the burden of armament is unnecessary in the changed state of international relations, public opinion would insist that the burden be lessened if not wholly removed. We recognize peace, not war, as the normal state of mankind; therefore all means calculated to maintain peace and which actually do maintain it are steps toward disarmament or the limitation of armaments. From this point of view, disarmament is not looked upon as a condition precedent to peace; but as the consequence of the pacific settlement of international disputes. If it be shown that vast armaments are a useless burden, it cannot be supposed that the taxpayer will voluntarily bend his back to the burden, and we shall find in international law, as we have found in municipal relations, that the hand that controls the purse will likewise control the sword. As aptly said by M. Bourgeois:

Disarmament is a consequence and not a preparation. In order that disarmament may be possible, it is necessary that



each should feel that his right is assured. It is the security of law which ought first to be organized. Behind this rampart nations will disarm easily because they will no longer have the fear which obliges them to arm themselves today. It is law and justice which must continue to be the first object of universal Conference; for those who desire peace, the creation and guarantee of justice between nations as between individuals is the veritable goal, for peace without law is not peace.<sup>1</sup>

### 3. FACTORS THAT MAKE FOR PEACE

A study of the present situation and the progress towards law as the measure and guarantee of international as well as national rights show that there are many and mighty factors making for peace.

It is a truism that peace is the normal condition of nations and that war, however much we may be exposed to its outbreak, is abnormal in its nature and temporary, although its consequences are spread over an incalculable future. The reason that peace is the normal state of affairs and not the exception is due to a universal desire for peace; for just as nations have found internal peace necessary to their development, they have found and are finding that international peace is indispensable to the progress of the world along the lines of justice and therefore of peace.

#### A. INDEPENDENCE AND INTERDEPENDENCE OF NATIONS.

There can be no doubt that the independence of nations has contributed to national and indeed to international stability, because when the independence of a nation is threatened by a powerful nation or combination of nations, it is idle to insist that the nation in jeopardy shall not prepare itself for the maintenance and assertion of its independence upon appropriate occasions. The statesman looks beyond national boundaries and devotes every resource of his country to the purpose of defense, so that revenues are squandered and the future

<sup>1</sup> Address of M. Léon Bourgeois on the Second Conference of the Hague, delivered before the Interparliamentary Union of France, November 14, 1907.

pledged to meet successfully an attack from whatever quarter it may come. In such a state of mind, trifles assume importance and an incident which should be unnoticed, and which would otherwise cause but little comment is magnified into an event of supreme moment. A state of unrest exists and a national outburst may at any time force the hand alike of king and minister. If we recall the fact that a stiff, uncompromising foreign policy is unfortunately popular with the masses, we can appreciate the temptation to which unscrupulous men of affairs are exposed, and we can see the fundamental importance of removing from the field of discussion and of danger, international controversies which may, if unsettled, serve as a pretext for war or war-like preparation.

If such is the situation when independence is an established fact, we can understand the confusion, approaching anarchy, before the independence of States was recognized as a fundamental and cardinal doctrine of international law. The people chafed under discrimination, and the recognition of independence and its corollary, equality, was regarded as indispensable to the existence of a nation, however small. The pretensions of the Holy Roman Empire to precedence in the family of nations, the claim of the Church, not merely to spiritual but to temporal ascendancy, without the means at hand to compel the one since the Reformation or to support the other since the principle of nationality made its entry into international law, received a shock, from which they never recovered, by the Treaty of Westphalia, which recognized the independence of nations irrespective of their origin or of their religious beliefs and sympathies.

The equality of nations, as has been said, follows from a recognition of their independence, and the institution of permanent embassies and legations, by means of which the interests of nations were represented and safeguarded in foreign parts upon a plane of equality, provided a means by which State might communicate readily with State through its chosen representatives, and by a free and frank exchange of views, settle controversies, which unfortunately arise, and

thus prevent divergence of views from reaching the acute stage of international controversies.

But however unqualified be the acceptance of independence and equality, we must understand that independence and equality mean independence and equality of right; that independence only confers the right to act freely and without dictation in accordance with the principles of justice; that independence cannot mean a right to violate the usages and customs which make up the body of international law, and that absolute national independence is as inconsistent with international law as the claim of absolute individual independence is unthinkable in the domain of municipal law. Absolute in terms, it is relative in its exercise; because the independence of any nation necessarily recognizes the independence of every other nation, for we cannot claim from others what we are unwilling to concede to them. Independence, therefore, in its actual exercise shades imperceptibly into dependence, and at the present day we see that progress is only possible if nations in the exercise of their absolute rights yield something in the interest of the family of nations, for absolute independence without check or control is synonymous with anarchy. A claim of absolute independence would result in international isolation, and no nation, any more than any man, can live for itself alone.

The independence of nations is therefore yielding to the interdependence of nations, and the question is not how far shall each nation act as an independent unit, but how far should it sacrifice, or can it sacrifice, its independent rights, and how far it can safely renounce its independence in matters unessential to its existence as a political unit. We are making the discovery in international politics that the whole is greater than any of its parts, and international conferences which meet with periodic regularity can only accomplish the results expected of them if each nation yields something of its initiative, not to any nation, but to the nations as a whole. Independence is the formula of the past; interdependence is the hope of the future.

These truths are so self-evident that they need neither argument nor illustration, and yet they may be made more acceptable—they can hardly be made clearer—by a few apt illustrations. War, we are told, is a relation between State and State, and yet we know that if two States be at war its consequences extend to the remotest corners of the earth. We cannot, if we would, isolate the combatants. If the war be land warfare, neutral subjects or citizens residing in the dominions of either combatant are affected by its progress, and their peaceable pursuits are checked and subjected to the supposed interests of the belligerents. Although not parties to the war and although they may have protested against its outbreak, they owe a temporary allegiance to the country of their residence, and all intercourse with the neutral citizens and subjects residing within the dominions of the other belligerent is illegal. If a war extend to the high seas, citizens and subjects at peace with the belligerents are hampered by the state of war, because they can no longer trade with either belligerent without submitting to visit and search; they may not trade in contraband of war without risk of seizure and capture, and they are excluded from blockaded ports. The commerce of the world is paralyzed; the markets of the world are thrown into confusion, because two or more nations have closed their ears to the voice of reason and have resorted to arms. The innocent are made to suffer with the guilty, although in a less degree.

#### B. INTERNATIONAL COMMERCE.

If, however, we consider how dependent each nation is upon the products, the industry and commerce of other nations, how unable it is to support itself without an exchange of its own products, we see at once that the consequences of war are not and cannot be confined to the belligerents, but that the neutral merchant, shipper and manufacturer are affected by the contest. I do not speak of the withdrawal of the subjects and citizens of the belligerents from productive employment, nor do I lay stress upon the economic distress caused by the



war and the taxes extended over a period of years which are its inevitable consequence. I look merely at the hardship to the neutrals, and ask myself whether the interest and advantage of peace to neutrals and the loss and injury caused by war will not lead them, influenced by enlightened selfishness, if not by higher motives, to throw the weight of their influence for the settlement of international conflicts by peaceable means.

As the language of the soldier in the field is perhaps more convincing than that of the philanthropist or the philosopher in his study, I quote the measured statement of General Washington, who, after securing the independence of his country on the battlefield, preserved that independence as our first President by an enlightened policy of peace and goodwill to nations. In a letter to Lafayette, written in 1786, he said:

Although I pretend to no peculiar information respecting commercial affairs, nor any foresight into the scenes of futurity, yet, as the member of an infant empire, as a philanthropist by character, and (if I may be allowed the expression) as a citizen of the great republic of humanity at large, I cannot help turning my attention sometimes to this subject. I would be understood to mean, I cannot avoid reflecting with pleasure on the probable influence, that commerce may hereafter have on human manners and society in general. On these occasions I consider how mankind may be connected like one great family in fraternal ties. I indulge a fond, perhaps an enthusiastic idea, that as the world is evidently much less barbarous than it has been, its melioration must still be progressive; that nations are becoming more humanized in their policy, that the subjects of ambition and causes for hostility are daily diminishing and in fine that the period is not very remote, when the benefits of a liberal and free commerce will pretty generally succeed to the devastations and horrors of war.<sup>1</sup>

Lest it may be supposed that this is an isolated expression of the soldier and statesman whom we revere as the father of his country, I quote the following passages from his writings.

In a previous letter, dated July 25, 1885, to David Hum-

<sup>1</sup> Ford's writings of George Washington, Vol. XI, pp. 58-59.

phreys, Secretary of the Commission sent abroad to negotiate treaties of commerce, he wrote:

My first wish is to see this plague to mankind [war] banished from the earth, and the sons and daughters of this world employed in more pleasing and innocent amusements, than in preparing implements and exercising them for the destruction of mankind. Rather than quarrel about territory, let the poor, the needy, and oppressed of the earth, and those who want land, resort to the fertile plains of our western country, the *second land of promise*, and there dwell in peace fulfilling the first and great commandment.<sup>1</sup>

In October 7, of the same year, in a letter to the Marquis de la Rouerie, an officer just appointed to the command of a French army corps, he said:

I never expect to draw my sword again. I can scarcely conceive the cause that would induce me to do it. . . . My first wish is (although it is against the profession of arms, and would clip the wings of some of your young soldiers, who are soaring after glory) to see the whole world in peace, and the inhabitants of it as one band of brothers striving who should contribute most to the happiness of mankind."<sup>2</sup>

Again, in a letter to Lafayette, dated January 10, 1788, he wrote:

To know the affinity of tongues seems to be one step towards promoting the affinity of nations. Would to God, the harmony of nations were an object that lay nearest to the hearts of sovereigns; and that the incentives to peace, of which commerce and facility of understanding each other are not the most inconsiderable, might be daily increased!<sup>3</sup>

<sup>1</sup> Ford's Writings of George Washington, Vol. X, p. 473.

In a letter of June, 1788, he wrote to Lafayette as follows:

"There seems to be a great deal of bloody work cut out for this summer in the north of Europe. If war, want, and plague are to desolate those huge armies that are assembled, who, that has the feelings of a man, can refrain from shedding a tear over the miserable victims of regal ambition? It is really a strange thing that there should not be room enough in the world for men to live without cutting one another's throats."—Sparks' Writings of George Washington, Vol. IX, p. 380.

This is the language of a pacifist, and were its authenticity not beyond question, it might well be attributed to Franklin, who looked forward to "the discovery of a plan that would induce and oblige nations to settle their disputes without first cutting one another's throats."—Letter to Richard Price, February 6, 1780.

<sup>2</sup> Sparks' Writings of George Washington, Vol. IX, pp. 138-139.

<sup>3</sup> Ibid., p. 306.

And, finally, lest these quotations become by their very number and weight oppressive, I quote from a letter dated April 25, 1788, to the Marquis de Chastellux, who had just taken to himself a wife:

While you have been making love, under the banner of Hymen, the great Personages in the North, have been making war, under the inspiration, or rather under the infatuation of Mars. Now, for my part, I humbly conceive, you have had much the best and wisest of the bargain. For certainly it is more consonant to all the principles of reason and religion (natural and revealed) to replenish the earth with inhabitants rather than to depopulate it by killing those already in existence, besides, it is time for the age of knight-errantry and mad-heroism to be at an end. Your young military men, who want to reap the harvest of laurels, don't care (I suppose) how many seeds of war are sown; but for the sake of humanity it is devoutly to be wished, that the manly employment of agriculture, and the humanizing benefits of commerce, would supersede the waste of war and the rage of conquest; and the swords might be turned into ploughshares, the spears into pruninghooks, and, as the Scripture expresses it, "the nations learn war no more."<sup>1</sup>

It cannot be doubted, therefore, that international commerce is a factor that makes strongly for peace, and that its triumph, however long delayed, will be as complete and beneficial as the triumph of neutral rights in the long contest with belligerent privileges.

#### C. GOOD UNDERSTANDING BASED UPON KNOWLEDGE AND SYMPATHY.

If we examine the relations of everyday life, we find that many, if not most of our differences with neighbors result from a partial and therefore imperfect understanding of their motives and purposes, and that a heart-to-heart talk, however disagreeable it may be, by explaining the difference and removing the difficulty, restores confidence, without which peace and content are impossible. If we consider controversies between nations we find, however unreasonable they may seem at first sight to be, that they are, nevertheless, suscep-

<sup>1</sup> Ford's Writings of George Washington, Vol. XI, pp. 247-248.

tible of explanation and settlement, if only we study the origin and nature of the controversy and, by a frank exchange of views with those entrusted with foreign relations, we eliminate the passion and prejudice by which they are beclouded, and seek a settlement in a spirit of confidence and fair-dealing based upon a knowledge of and a respect for the views of our antagonist. Should we not adopt the method of Isaiah "Come, now, and let us reason together" (Isaiah, 1: 18), and in so doing let us not reason with unprofitable talk nor with speeches wherewith we can do no good (Job, xv: 3); for we may be assured that if we are willing and obedient we shall eat the good of the land, but if we refuse and rebel we shall be devoured with the sword (Isaiah, 1: 19, 20).

If we leave the language of scripture and seek modern authority, we find that our honored Secretary of State has impressively told us

that there are no international controversies so serious that they cannot be settled peaceably if both parties really desire peaceable settlement, while there are few causes of dispute so trifling that they cannot be made the occasion of war if either party really desires war. The matters in dispute between nations are nothing; the spirit which deals with them is everything.<sup>1</sup>

In order to reach this understanding so essential to the settlement of international as well as private controversies, it is indispensable that nations and their peoples be brought closer together. The Greeks termed the foreigner a barbarian, and the word "barbarian," applied indiscriminately to foreigners, was a badge of contempt; but had the foreigner come into close and peaceable relations with them, and had not their relations been largely those of war, it is inconceivable that the open-minded Greek would not have recognized the many admirable qualities possessed by the foreigner and been able to meet him with the sympathy begotten of a good understanding.

<sup>1</sup> Address of Hon. Elihu Root, Secretary of State, on laying the cornerstone of the home of the Bureau of the American Republics, May 11, 1908; *American Journal of International Law*, Vol. II (1908), p. 624.



If we shut ourselves out from our neighbors, we can neither expect to know them nor that they should know us, and if a nation lives in isolation, pursuing its ideal without intercourse with the outer world, can we reasonably expect either that our motives be understood, or that the foreigner extend to us the confidence without which international intercourse is impossible? Should a man desire friends he must show himself friendly, and if we desire to cultivate friendship within the family of nations, we must show that our aims and purposes are not inconsistent with the progress and development of foreign nations, and that we extend to them the friendship which we expect from them in return. We maintain that we have no desire for foreign conquest; that the American ideal is individual liberty at home and peace abroad. If we expect our professions of friendship and our desire for international peace to be believed and acted upon, we must show, not merely by words alone but by deeds, which speak louder than words, that we live up to our professions and seek to extend their blessings to foreign countries. To quote again from Washington, while he was still known as the General and not the President and statesman of the young republic:

In whatever manner the nations of Europe shall endeavor to keep up their prowess in war, and their balance of power in peace, it will be obviously our policy to cultivate tranquility at home and broad; and to extend our agriculture and commerce as far as possible.<sup>1</sup>

We cannot hope adequately to appreciate foreign nations if we keep them at arm's length, and, confident of our superiority, look down upon them as inferiors. Neither can we understand them and rightly gauge their motives and practices unless we study their history, for it is a mere truism to state that a nation is the product of its past; nor can we form a proper conception of the place they claim and actually do occupy in the world's affairs unless we familiarize ourselves with their ideals in literature, in art, and in philosophy, which, after all,

<sup>1</sup> Letter to Thomas Jefferson, dated August 31, 1788; Ford's Writings of George Washington, Vol. XI, p. 320.

are the truest measure of a people's greatness. If we would rightly estimate their foreign policy, we should study their domestic institutions, for not merely the form, but the substance of foreign policy is often determined by national limitations, the form and forms of government through which diplomacy must needs speak. It is not given to everyone to obtain a first-hand knowledge of foreign countries by travel and residence; but a mastery of foreign languages in which the thought of a nation expresses itself would enable us to appreciate the genius of the people, unobscured by the inaccuracies and infelicities of translation by which the essence is so often beclouded or lost.

We must not, however, imagine that we have familiarized ourselves with the history of a nation and understand the forces which have made it what it is, if we have confined ourselves to the doings and misdoings of reigning sovereigns, the intrigues of court life, and the details of a campaign or a battlefield. The greatness of a nation lies in its peaceful development. Military glory is evanescent and often vanishes without a trace either of itself or of the country. Sparta is dead beyond power of reconstruction; Athens, the home of industry and commerce, the favorite seat of literature and art, lives in the world's history. It triumphed with the triumphs of peace, not of war, for war caused its decline, not its greatness. England is the land of Chaucer, of Shakespeare, and of Milton, the mother of constitutional government, the center of industrial development. Germany is not wholly an armed camp. Its claim to greatness rests upon a Luther, a Beethoven, a Goethe, a Schiller, a Kant. We must insist, therefore, that history be studied not merely as a chronicle of battles, but as a record of the industrial and social, intellectual and constitutional development. Then will the triumphs of peace be seen to be permanent, the triumphs of war to be passing, although its evils remain to perplex and torment future generations. A knowledge of history thus conceived, a familiarity with the literature, art, and philosophy of foreign countries, a knowledge of the foreign languages, which are as

a key to the national treasure, personal intercourse, foreign travel and residence in foreign countries are assuredly factors that make for peace, because they result in a broad, comprehensive understanding of those who are to us as neighbors.

D. PEACE SOCIETIES, INTERNATIONAL CONGRESSES,  
CONFERENCES, ASSOCIATIONS, UNIONS

It has been shown that international arbitration is the gift of the Anglo-Saxon and that it dates in modern form from Jay's Treaty of 1794.<sup>1</sup> It is susceptible of proof that the great movement in favor of peace between nations, so characteristic of the present day, originated in the United States, where the first peace society was founded in New York by David Low Dodge and a band of devoted followers who, at the very close of the war between Great Britain and the United States, organized the New York Peace Society in August, 1815. This was followed by the Massachusetts Peace Society, organized on December 26, 1815, under the leadership of Noah Worcester, whose Solemn Review of the Custom of War has had great influence upon the movement. The American Peace Society, which still exists, was organized in New York on May 8, 1828, on the initiative of William Ladd, who, by his many labors, to quote the language of Charles Sumner, "enrolled himself among the benefactors of mankind." The movement spread to England where, under the leadership of the Quaker philanthropist, William Allen, the English Peace Society, the first in Europe, was formed on June 14, 1816.

It is unnecessary to trace in detail the history of these pioneer societies. It is sufficient to say that from modest, not to say humble beginnings, the influence of these pious and God-fearing men has made itself felt in the remotest portions of the globe. They were indeed the light of the world and, like the city set on a hill, could not be hid. (Matt. v, 14.) The parent societies and their branches have not been content to denounce war or to show its manifold and self-evident evils; they have proposed in season and out of season

<sup>1</sup> See Chapter V, *supra*, pp. 190-212.

a resort to peaceful means of settlement, whether it be the extension of good offices and mediation, whether it be arbitration clauses in general treaties, or the meeting of Congresses for the codification of international law, and the establishment of permanent courts for its administration in the settlement of international disputes. It would be too much to say that their informal congresses, largely due to Elihu Burritt and Henry Richard, friends and apostles of peace, in which they championed the cause of arbitration and insisted upon the establishment of a Court of Nations, are to be regarded as the immediate or natural precursors of The Hague Conferences; but it is due to them to state that their congresses, composed of representatives of many nations, the discussion of their plans and projects within the conferences and in the press, familiarized the nations with their views and created a strong and insistent public opinion for their realization. We cannot measure their influence by mere positive results, any more than we can properly judge the possibilities of The Hague Conferences by the results actually accomplished. By bringing nations closer together, by exchanging views upon these great and fundamental subjects, by personal intercourse with representatives of foreign countries, and by activity in the press, they rendered a service to the cause of peace which should not, which cannot, be overlooked. The pacifist today is not synonymous with the Utopian or the dreamer; he does not find himself standing alone and discredited among his fellow-countrymen, but in the center of a goodly company composed of men of affairs in high places, with men who follow the profession of arms, with merchants who shun war as inimical to commerce and the highest interests of the State, and with the friends of mankind irrespective of locality and irrespective of speech.

But the peace societies and the professed pacifists have not been the only means of bringing nations and their representatives together, albeit in an informal manner. The meeting of every international association and learned society, whether it be in connection with an exposition or a world's fair, whether



composed of domestic and foreign students of religious questions, or of specialists in social science; or, again, whether it be a congress of physicians, such as the International Tuberculosis Congress, assembled to study great problems and by an interchange of views to reach conclusions of value; or whether it be an assembly of people interested in alleviating the needless suffering and death on the battlefield, such as the Red Cross Conference of 1864, or an informal meeting of the members of the various parliaments of the world, such as the Interparliamentary Union organized by two professional pacifists, the late Randal Cremer and the venerable Frédéric Passy, or finally, whether it be a meeting for any scientific purpose in which representatives of foreign countries are present, advances the cause of peace by bringing leaders of thought, science and public opinion together, and promotes, indeed creates, good understanding between nations.

We are so accustomed to these meetings that we attach little importance to them; yet they are international events of no mean importance. The Crystal Palace of 1852, the Centennial Exhibition of 1876, the Universal Expositions at Paris in 1878 and 1889, the Chicago World's Fair of 1893, the Pan-American Exposition of 1901, the St. Louis World's Fair of 1904 to celebrate the peaceful acquisition of the vast stretch of territory embraced in the Louisiana Purchase, the Jamestown Exposition of 1907, brought the nations together, and in so doing made for peace.

Special mention should be made of the Institute of International Law, founded at Ghent in 1873, composed of leading representatives of international law in the various nations recognizing and applying international law in their foreign relations, for the scientific study of international law and the regular and scientific development of its principles. The Institute owed its origin to a letter written by M. Rolin-Jaequemyns in 1873 and sent to some twenty jurists, proposing a private meeting of a limited group of men already known in the science of international law by their writings or by their acts, and belonging as much as possible to different countries.

Hitherto, said M. Rolin-Jaequemyns, the movement toward the regularization of international relations has manifested itself in two ways:

(a) By diplomatic action, that is to say, by the proceedings, the correspondence, the conventions, or the congresses of representatives officially accredited by certain nations.

(b) By individual scientific action, that is to say, by writings having for their object to express, in a precise, methodical, and reasoned form, the whole or a part of the rules which their author considers as those which are followed, or which ought to be followed, in international relations.

Diplomatic action originally intervened only after the termination of wars, in order to discuss and to determine the conditions of peace. At present it tends, with a goodwill not always sterile, to meet requirements of a higher order. Thus we have seen it already more than once endeavor

1. To trace certain general rules dictated by a spirit of humanity and justice, and going beyond the political necessities of the moment.

2. To admit into the domain of positive international law an increasing number of relations which till then were held to belong to national law.

3. To accomplish the arrangement of international differences by pacific arbitration.

Individual scientific action, in a manner equally progressive, has more and more recognized the obligation which lies upon it to give a reasoned direction to public opinion by formulating rules which, as far as possible, exhibit the characteristics of certitude and practical efficacy. Already some jurisconsults have adopted for their writings the form of veritable codes. It would seem, then, that for the science of international law we have arrived at an epoch corresponding to that of the appearance of the history of the national law of several peoples of those collections (*recueils*) due to private sources, and which have served as a transition between simple customary tradition and homologous customs or written law. But these progressive aspirations of the two grand factors of international law come in practice in collision with the gravest obstacles. Diplomacy is impeded by conflicts at least apparent between the political interests of the particular peoples who are the subjects of the law, and the collective interest of international society; individual scientific action is rendered impotent by the fact that isolated speculations or works, however great may be the merit of the reputation of the man whose name is attached to them, do not carry sufficient weight to dominate passions and triumph over prejudices. . . .

Is there nothing then to be done? The object, on the contrary, which I have in view, is to call the attention of the

eminent persons to whom this writing is communicated to the necessity, the possibility, and the opportunities of giving body and life, alongside of diplomatic action and individual scientific action, to a new and third factor of international law: to collective scientific action.<sup>1</sup>

The Institute of International Law has lived up to the hope and ambition of its founders, and there is scarcely a doctrine of international law which has not received examination by its members and has not been improved and developed. Its conclusions merely voice the views of its individual members and possess no legislative or binding force, but the weight of its reasoning and the soundness of its judgment have caused the Institute to be cited with respect by writers of authority, by ministers of foreign affairs,<sup>2</sup> and to win general approval and acceptance.

The International Law Association was founded in 1873 as an organization for the reform and codification of the Law of Nations. It admits to membership all who take an interest in the objects of the Association, and although the membership is largely English, its annual meetings are held in various cities of the continent of Europe. The International Law Association is broader in its foundation than the Institute. Its membership is open to others than specialists, and its work though less scientific is nevertheless important. Its meetings bring together students and scholars from many countries, and it thus exercises no inconsiderable influence in molding international opinion. Every society of international law, whether it be national in origin and influence, and every journal of international law, whatever the language in which it is published, is a factor that makes for peace.

It would be wearisome to enumerate the many conferences called by Governments which have resulted in the formation of international unions and have laid the foundation of a law of

<sup>1</sup> Lorimer's *Studies National and International*, pp. 79-81.

<sup>2</sup> For one of many instances in our diplomatic correspondence, see Secretary Olney's instruction in the *Hollander Case*, Moore's *International Law Digest*, Vol. IV, pp. 102, et seq.

international administration, which fall naturally, according to Professor Reinsch's classification, into seven groups: I. Unions dealing with the subject of communication, such as the Telegraphic Union;<sup>1</sup> the Universal Postal Union, composed of 55 States and colonies, which may be considered as the model union;<sup>2</sup> the International Union of Railway Freight Transportation;<sup>3</sup> the Conferences Concerning Navigation;<sup>4</sup> II. Unions to Serve Economic Interests, such as the Metric Union;<sup>5</sup> the Union for Industrial, Literary and Artistic property;<sup>6</sup> the Union for the Publication of Customs Tariffs;<sup>7</sup> the various Conferences for the International Protection of Labor;<sup>8</sup> and the Conferences Concerning the Sugar Industry,<sup>9</sup> Agriculture,<sup>10</sup> and Insurance.<sup>11</sup> III. Sanitation and Prison Reform, including the International Prison Congress,<sup>12</sup> International Sanitation,<sup>13</sup> and the Geneva Convention so frequently mentioned.<sup>14</sup> IV. Police Powers, under which heading fall the Questions of the Regulation of Fisheries,<sup>15</sup> the Protection of Submarine Cables,<sup>16</sup> the African Trade and Liquor Traffic,<sup>17</sup> the Repression of the White Slave Trade.<sup>18</sup> V. Scientific Purposes, embracing, in addition to commissions and bureaus previously mentioned, the International Geodetic Association.<sup>19</sup> VI. International Commissions and Unions for Special and Local Purposes, such as the Commissions for the Regulation of the Navigation of the Rhine and Danube, the Berlin Conference of 1885 which instituted the Commission for the Congo.<sup>20</sup> VII. The American International Unions,

<sup>1</sup> For details of this important international administrative union, see Reinsch's *International Unions and their Administration of International Law* (1907), Vol. I, pp. 582-585

<sup>2</sup> *Ib.*, pp. 586-589.

<sup>3</sup> *Ib.*, pp. 589-593.

<sup>4</sup> *Ib.*, 593-594.

<sup>5</sup> *Ib.*, p. 595.

<sup>6</sup> *Ib.*, pp. 595-597.

<sup>7</sup> *Ib.*, pp. 597-598.

<sup>8</sup> *Ib.*, pp. 598-602.

<sup>9</sup> *Ib.*, pp. 602-604.

<sup>10</sup> *Ib.*, pp. 604-608.

<sup>11</sup> *Ib.*, pp. 608-609.

<sup>12</sup> *Ib.*, pp. 609-610.

<sup>13</sup> *Ib.*, pp. 610-612.

<sup>14</sup> *Ib.*, pp. 612-613.

<sup>15</sup> *Ib.*, p. 613.

<sup>16</sup> *Ib.*, pp. 613-14.

<sup>17</sup> *Ib.*, pp. 614-615.

<sup>18</sup> *Ib.*, pp. 615-616.

<sup>19</sup> *Ib.*, pp. 616-618.

<sup>20</sup> *Ib.*, pp. 618-621.



culminating in the International Union of American Republics, whose executive organ is the Bureau of the American Republics located at Washington.<sup>1</sup>

In concluding his valuable paper on the subject of International Unions and their Administration, Professor Reinsch understates rather than overstates the truth when he says that "we cannot fail to be powerfully impressed with the importance which these relations have gained in modern international life." They are drawing the world closer together; for the independence of nations they are substituting the principle of interdependence and at the same time they are laying the foundations of that good understanding which is indispensable to a permanent peace.<sup>2</sup> The Conferences at The Hague are a continuation: a culmination rather than a departure.

We have thus seen that the independence of nations is giving way, slowly and unconsciously it may be, to the interdependence of nations; that international commerce flourishes in peace, is checked by war and is, therefore, a factor that makes for peace; that the various peace societies, international congresses due to private initiative, scientific meetings and associations, and the various conferences convoked by Governments for a nonpolitical purpose advance the cause of peace by drawing the nations closer together for a common purpose. They are factors that make for peace; they show its advantage, indeed its necessity; they have created in various ways and in various degrees a public sentiment in favor of peace, and they furnish arguments and authority to the statesmen who seek to

<sup>1</sup> Reinsch's *International Unions and their Administration of International Law* (1907), Vol. I, pp. 621-622; Reinsch's *International Administrative Law and National Sovereignty*, *ibid.*, Vol. III, pp. 1-45 (1909).

<sup>2</sup> See, also, the admirable article, by the Hon. Simeon E. Baldwin, on *The International Conferences and Congresses of the Last Century as Forces Working Toward the Solidarity of the World*, *American Journal of International Law* (1907), Vol. I, pp. 566-578. And see, especially, the Appendix to Judge Baldwin's Article, *ibid.*, pp. 808-829, for a chronological and analytical list of the various nonpolitical conferences of the nineteenth century.

create institutions by which peace may be maintained, international controversies settled, and war rendered less frequent.

#### E. IMPORTANCE OF CONSTITUTIONAL OR REPRESENTATIVE GOVERNMENTS

In his essay on Perpetual Peace, published in 1795, the philosopher Kant, proposed as the very first article of the treaty by which permanent peace is to be secured that the civil constitution of every State shall be republican. An examination of the context shows that the philosopher did not use republican in our sense of the word, but as synonymous with constitutional and representative government in which the sovereign or head of the State possesses limited power, in which the many control the few and determine the policy and measures whose consequences they must necessarily bear. "Republicanism," he says, "is that form of government in which the executive power is separated from the legislative." Writing in the throes of the French Revolution, when the sword was the measure if not the origin of right, the little man of Königsberg saw that nothing was to be hoped from nations and States in which an autocrat determined the fate of the country, and in which popular, that is to say representative, government, controlled by public opinion, did not exist.

After showing that a republican, that is, representative, form of government is the only one consistent with the principles of freedom, with the dependence of all as subjects upon a common legislature, and with the principle of equality of the citizens of the State, Kant says that "the republican constitution, in addition to the fact that it springs out of the pure concept of right," gives promise of realizing the desired end, namely, perpetual peace. The reason for this, he says, may be stated as follows:

Where the consent of the citizens of the State is required to determine whether there shall be war or not, as must necessarily be the case where the republican constitution is in force,

nothing is more natural than that they should hesitate much before entering on so perilous a game. If they do so, they must take upon themselves all the burdens of war, that is, the fighting, the defraying of the expenses of the war out of their own possessions, the reparation of the destruction which it causes, and, greatest of all, the burden of the debts incurred, an endless burden because of the continual prospect of new wars and one which therefore embitters peace itself. On the contrary, in a State where the government is not republican and the subject not a voting citizen, war is the easiest thing in the world to enter upon, because the ruler is not a fellow citizen of the State, but its owner. War does not therefore interfere the least with his table enjoyments, his hunting, his pleasure castles, his court feasts, and the like. He decides lightly to enter upon it, as if it were a sort of pleasure party, and as to its propriety he without concern leaves the justification of it to the diplomatic corps who are always ready to find him excuses.<sup>1</sup>

It may be that Kant was over-sanguine of the peaceableness of constitutional governments, but it is a fact that free and representative governments prefer peace to war and the settlement of international controversies by arbitration. Great Britain and the United States have arbitrated more cases than all other countries of the world, and it is but the sober truth to say that modern arbitration is the gift of the Anglo-Saxon. Kant was therefore right in the main, because the power that controls the purse controls the sword, and in a constitutional and representative form of government the head, whether he be called king or president, is the servant of the people. An enlightened and educated public opinion in favor of peace has sprung up in every constitutional nation, and Kant is correct in regarding republican, that is, representative government, which permits the formation of a public opinion, whose voice it hears and obeys, as a factor that makes for peace.

#### F. GROWING SENSE OF USELESSNESS OF WAR

A factor making for peace which cannot be overlooked and which is worthy of the greatest consideration is the growing

<sup>1</sup> Kant's *Perpetual Peace*, Dr. Trueblood's translation, published by the American Peace Society, pp. 11-12.

sense of the uselessness of war, which not only fails to decide the right or wrong involved in a controversy, disarranges neutral trade and commerce and crushes the belligerents under a burden of economic loss and taxation, but also weakens a nation by the sacrifice of those elements which are fittest to survive and upon which the type of the nation as well as the individual depends. The Laws of Nature do not apply solely to the inferior animals. Variation, heredity, segregation and selection determine the human being just as surely as they determine the quality, the character, in a word, the breed of the animal. We do not improve the stock from the feeble, the broken, the dull of wit, the coarse of limb, to use the language of Dr. Jordan,<sup>1</sup> and we cannot develop a race of men, equal to the demands of civilization and capable of advancing it, from the scullion, the outcast, the weakling, the coward and the slave.

A standing army in time of peace is an economic loss. The nation in arms and in action sacrifices the flower of the nation, the very bud and blossom of mankind. Modern science has shown this beyond peradventure, and the first enunciation of this great and fundamental truth, which must give us pause if we will save civilization from the battlefield, is due to the sagacious Dr. Franklin, who saw through the forms of things and laid bare the substance.<sup>2</sup>

Of an interview of October 2, 1783, between Dr. Franklin and John Baynes, Romilly's friend, Mr. Baynes gives the following account in his diary:

Insensibly we began to converse on standing armies, and he seeming to express an opinion that this system might some time or other be abolished, I took the liberty to ask him in what

<sup>1</sup> David Starr Jordan's *Human Harvest: A Study of the Decay of Races through the Survival of the Unfit*, 1907, published by the American Unitarian Association of Boston (p. 25).

<sup>2</sup> Sir Samuel Romilly was not only a good judge of men, but in his long career met the celebrities of his generation. In his autobiography he thus speaks of the impression produced upon him by the interview which Dr. Franklin gave to Romilly and Baynes in 1783: "Dr. Franklin was indul-



manner he thought it could be abolished; that at present a compact among the Powers of Europe seemed the only way, for one or two Powers singly and without the rest would never do it; and that even a compact did not seem likely to take place, because a standing army seemed necessary to support an absolute government, of which there were many in Europe. "That is very true," said he; "I admit that if one Power singly were to reduce their standing army, it would be instantly overrun by other nations; but yet I think that there is one effect of a standing army which must in time be felt in such a manner as to bring about the total abolition of the system." On my asking what the effect was to which he alluded, he said he thought they diminished not only the population, but even the breed and the size of the human species. "For," said he, "the army in this and every other country is in fact the flower of the nation—all the most vigorous, stout, and well-made men in a kingdom are to be found in the army. These men in general never marry."<sup>1</sup>

In the course of the same interview Mr. Baynes mentioned what seemed to him to be an omission in the Constitution of America, namely, the want of any sufficient armed force. Dr. Franklin, according to Baynes, seemed to think the objection of no great weight.

"For," said he, "America is not, like any European power, surrounded by others, every one of which keeps an immense standing army; therefore she is not liable to attacks from her neighbors—at least, if attacked she is on an equal footing with the aggressor, and if attacked by any distant power she will always have time to form an army. Could she possibly be in a worse situation than at the beginning of this war, and could we have had better success?"

gent enough to converse a good deal with us, whom he observed to be young men very desirous of improving by his conversation. Of all the celebrated persons whom, in my life, I have chanced to see, Dr. Franklin, both from his appearance and his conversation, seemed to me the most remarkable. His venerable patriarchal appearance, the simplicity of his manner and language, and the novelty of his observations, at least the novelty of them at that time to me, impressed me with an opinion of him as of one of the most extraordinary men that ever existed."—*The Memoirs of the Life of Sir Samuel Romilly*, by his sons, 2 vol. ed., 1842 (Vol. I, p. 69).

<sup>1</sup> Printed originally in *Memoirs of the Life of Sir Samuel Romilly*, by his Sons, Vol. I, Appendix; reprinted in *Bigelow's Works of Benjamin Franklin*, Vol. VIII, p. 420.

History is but a commentary on the statement of Dr. Franklin, for standing armies and their destruction in battle have sacrificed the fit to the unfit and ruined the nation on the battlefield. The history of Rome is nothing but the gradual elimination of the fit and the perpetuation of the scullion, the weakling, the coward and the outcast. Out of every hundred thousand strong men, eighty thousand were slain. Out of every hundred thousand weaklings, ninety to ninety-five thousand were left to survive.<sup>1</sup> The German conquered the Roman, not because Rome was weakened by luxury and self-indulgence, which affected but a small percentage of the population, but because the barbarian was physically fit, whereas Rome, depleted by war, was unequal to the contest.<sup>2</sup>

We may close our eyes to history and refuse to listen to its teachings, but the fact is and always has been that war deprives a nation of the most fitted to maintain its existence, and a succession of wars ruins the stamina of a nation no matter by what sophistry we may disguise the fact or explain the consequence.

It is not maintained or asserted that war may not draw out the higher instincts of a nation; that courage and self-sacrifice, of which we are proud and whose traditions we cherish, are produced and made prominent in war in ways impossible in peace; but the misfortune and the scourge of war lie in the fact that these very qualities are sacrificed and lost; for, to repeat the language of Dr. Franklin: "the army is the flower of the nation. All the most vigorous, stout, and well-made men in a kingdom are to be found in the army. These men in general never marry." Those who dispute the truth of this assertion and the natural deductions from it are referred to Dr. Jordan's *Human Harvest*. The realization of this

<sup>1</sup> Dr. Otto Seeck's calculation in his *Geschichte des Untergangs der antiken Welt*, Vol. 1, p. 303.

<sup>2</sup> Die Ausrottung der Besten, die jenen schwächeren Völkern die Vernichtung brachte hat die starken Germanen erst befähigt, auf den Trümmern der antiken Welt neue dauernde Gemeinschaften zu errichten—Dr. Otto Seeck's *Geschichte des Untergangs der antiken Welt*, Vol. 1, p. 308.

state of affairs will one day reach the people, and it cannot be doubted that they will save themselves and their countries by insisting upon the settlement of international disputes in a way which does not deprave humanity and jeopardize civilization.

#### G. SENTIMENT IN FAVOR OF ARBITRATION AND JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES

A great factor making for peace—perhaps the most hopeful at the present day—is the widespread sentiment in favor of arbitration, and the desire to substitute for armed conflict between nations the judicial processes and machinery which have abolished private war between individuals and which are capable of rendering war between nations less frequent, if they cannot wholly abolish it as an extraordinary legal remedy. In the process from unrestricted self-help to redress a wrong or to secure the possession of a right to the establishment of courts of justice, controlled and maintained by the State for the repression of crime and for the administration of justice between man and man, four stages of development are clearly discernible, although it would be as difficult to determine the distinction between the stages as it would be to the eye to note the transition from darkness to daylight. These stages have been admirably stated and summarized by Professor Lawrence in a remarkable essay on the Evolution of Peace,<sup>1</sup> from which a paragraph is quoted:

At first every man has to protect himself, and the injured party depends entirely for redress upon his own and his family's power to secure it. Then the customs of the community, and the laws promulgated by its rulers, impose limitations upon the right of private vengeance. It is regulated and directed, but not forbidden. Though limited in operation, it still remains the chief if not the only means of punishing wrong. The third stage is reached when side by side with it there exists in full operation an alternative method of doing justice between man

<sup>1</sup> Essays on Some Disputed Questions in Modern International Law, by T. J. Lawrence (1885), 2d ed., pp. 234–277.

and man, and making criminals suffer for their misdeeds. This method is that of trial before impartial State tribunals, who decide each case on its merits, as administrators of a passionless law. So great are the advantages of this system that both spiritual and temporal rulers bend their energies to the task of securing its universal adoption. In time their success is complete; and the fourth stage is marked by the entire abolition of the old right of unregulated and self-inflicted vengeance. Looking back on the record of human progress, we can see that the passions of early man were so strong, and his reason so weak, that nothing but the wild justice of revenge would satisfy him. We trace the gradual rise of State authority, as organization proved to be a mighty power in the struggle for existence. We observe how that authority first sought to regulate the use of force in private feuds, and then provided an alternative in the tribunals which it established and armed with coercive power. The next step shows us the survival of the fittest in the increase of the authority of the courts of law, and the decay of private war. At last civilization banishes the vendetta altogether, and civilized man regards it as a mark of barbarism, when he observes it in less advanced communities.<sup>1</sup>

Unconsciously the same evolution is taking place in the history and practice of war. In the first stage, real or fancied aggressions give rise to war between tribe and tribe, nation and nation, and hostilities are conducted according to the whim and pleasure of the contending parties without restriction upon the means and method of warfare. As between individuals, so between masses of men: unbridled force, unlimited self-help punish the wrong and secure the enjoyment of the right. In the next stage, to quote the language of Professor Lawrence, "we see in the record of the blood feud, regulation and limitation of individual impulses by the custom of the community or the commands of its rulers." Self-help which permitted judicial combat is allowed, but it is modified by custom and regulated by law. The usages and customs of war, accepted tacitly or expressly by nations, the regulation of war by declaration or legislative enactment of conferences check the excesses and abuses of the system while recognizing and, as it were, legalizing its existence. In the third stage,

<sup>1</sup> Essays on Some Disputed Questions in Modern International Law, by T. J. Lawrence (1885), 2d ed., pp. 255-256.



courts of justice are created for the repression of crime and the redress of civil injuries and exist side by side with self-help and a regulated judicial combat. The remedy administered in the former triumphs not only by the reasonableness of its methods, but by the certainty and efficacy of its remedy. Arbitration between nations, in which right and justice are ascertained by a judicial proceeding, the creation of the permanent panel of judges by the First Hague Conference from which a temporary tribunal may be constituted for the settlement of international difficulties by judicial and therefore peaceful means, mark the third stage and render the analogy between private and public warfare complete. Self-redress lingers, but its exercise shocks the public conscience. The judicial proceeding appeals to the community at large, and the court triumphs because it proves itself to be the fittest means to maintain and administer justice.

May we not hope the same development in international law as in national law, namely, that arbitration and judicial procedure will persuade nations, as it has convinced communities, of its reasonableness and superiority as a method of adjusting controversies, and that the resort to arms, which is in reality self-redress, may become increasingly less frequent? If we bear in mind the fact that private arbitration produced the Roman judiciary, and if we take note of the sentiment in favor of public arbitration, is it not within the bounds of reason to predict that international arbitration will develop an international judiciary, and that the Ishmaelite shall be an outcast in the family of nations just as surely as the desperado is an outlaw in modern society? Lest this expectation be denounced as a dream and the utterance of a visionary, I quote the language of one who, in word and deed, was eminently practical. In a letter to the Universal Peace Union of Philadelphia in December, 1879, General Grant wrote:

Although educated and brought up as a soldier, and probably having been in as many battles as anyone, certainly as many as most people could have been, yet there was never a time nor a day when it was not my desire that some just and fair

way should be established for settling difficulties, instead of bringing innocent persons into conflict, and thus withdrawing from productive labor able-bodied men who, in a large majority of cases, have no particular interest in the subject for which they are contending. I look forward to a day when there will be a court established that shall be recognized by all nations, which will take into consideration all differences between nations and settle by arbitration or decision of such court these questions.

## CHAPTER XV

### UNFINISHED BUSINESS OF THE SECOND CONFERENCE. IMMUNITY OF PRIVATE PROPERTY CONTRABAND BLOCKADE DESTRUCTION OF NEUTRAL PRIZES

The foregoing examination of the positive results of the Second Conference shows that the First, Second, and Third Commissions succeeded in drafting and presenting to the Conference projects dealing with the various subjects entrusted to their consideration, whereas the Fourth Commission, dealing with intricate or complicated questions of naval warfare, involving largely the rights and duties of neutrals, was unable to reach definite conclusions on a number of the subjects included in its original program. The program, it will be recalled, included the following subjects: (1) Transformation of merchant vessels into war vessels; (2) Private property on the high seas; (3) Delay allowed for the departure of enemy vessels in enemy ports; (4) Contraband of war; (5) Blockade; (6) Destruction of neutral prizes by *force majeure*; and (7) Provisions regarding land warfare applicable to naval warfare. Agreement was reached on (1) Transformation of merchant ships into war vessels; (3) Delay allowed for the departure of enemy merchant vessels in enemy ports, and a *vœu* was adopted providing that the principles of land be applied to naval warfare until the next Conference codify the laws and customs of naval warfare.

In the course of discussion the following subjects, not mentioned in the program, but within its spirit, were acted upon: the status of correspondance in time of war; the treatment to be accorded the crew of enemy merchant vessels and the exemption from capture of fishing smacks and other vessels. These three subjects formed as many separate conventions, so

that the positive result of the deliberations of the Fourth Commission is embodied in five conventions and a *voeu*. The subjects of private property of the enemy on the high seas; contraband; blockade, and the destruction of neutral prizes, were not so fortunate, and, notwithstanding the great desire of M. de Martens, President of the Commission, and its various members that agreements on these topics be reached and registered in conventional form, the Final Act contains directly or indirectly no reference to them. The discussion, was, however, valuable; for a free and full exchange of views pointed out the differences of opinion which must be overcome or reconciled before the Third Conference can codify the laws and customs of naval warfare.

Each of these topics will be considered briefly and in turn in order that the fate of the Russian program at the hands of the Conference may be appreciated and understood.

#### 1. IMMUNITY OF UNOFFENDING PRIVATE PROPERTY OF ENEMY UPON HIGH SEAS

The immunity of private unoffending property of the enemy upon the high seas has long been a favorite doctrine, though never the practice of the United States. The American delegation to the First Conference was instructed to present the doctrine in the following terms:

As the United States has for many years advocated the exemption of all private property not contraband of war from hostile treatment, you are authorized to propose to the Conference the principle of extending to strictly private property at sea the immunity from destruction or capture by belligerent Powers which such property already enjoys on land as worthy of being incorporated into the permanent law of civilized nations.<sup>1</sup>

The second volume of Mr. Andrew D. White's autobiography shows with what care and solicitude the subject was regarded

<sup>1</sup> See Instructions to the American Delegation, Vol. II, p. 9.



and how Dr. White personally presented the doctrine in an appropriate manner at the opportune moment.<sup>1</sup>

The subject did not figure in the official program to the First Conference, but the American delegation sought at various times to introduce it and secure its consideration. A *voeu* was eventually agreed to that the question should figure in the program of a future conference, and at the fifth plenary session of the Conference, held on July 5, 1899, Dr. White read a carefully prepared paper which was spread in full upon the record of the Conference.<sup>2</sup>

In the circular letter of October 21, 1904, which may be considered as the call of the Second Conference, Mr. Hay quoted the resolution of the Senate and House of Representatives of April 28, 1904, in favor of the immunity, and the Russian program, dated April 12, 1906, included properly and necessarily the subject of private property of the enemy upon the high seas. The Instructions to the American Delegation to the Second Conference not only authorized but required the submission of the question.<sup>3</sup>

The discussion of the immunity of private property, proposed by the American delegation, began on the twenty-eighth of June and closed on the twelfth of August, 1907. The Fourth Commission was unable to reach an agreement on this important question, although the American proposal was supported by Mr. Choate in an address of great power and beauty, clearness and precision in which the arguments for the proposition were exhausted and the objections submitted to a keen and searching examination and criticism. In the course of debate, proposals and counter-proposals, amendments and declarations were made, and the discussion was as profound and thorough as the subject was important. If agreement was not reached, it was due solely to the fact that large maritime powers such as Great Britain, Japan and

<sup>1</sup> Vol. II, pp. 262, 266, 283, 287, 289, 290, 296, 316-317, 328; Holls' Peace Conference, pp. 306-321.

<sup>2</sup> La Conférence Internationale de la Paix, 1899, part I, pp. 31-33.

<sup>3</sup> See instructions, Vol. II, pp. 192-194.

Russia, and in a lesser degree France, were unwilling to renounce the right of capture of private property, either as a means of preventing a resort to arms or of shortening the war by bringing the enemy to terms. Less drastic measures failed for the same reason.

The importance and interest of the subject in itself, as well as the desire to treat it impartially, suggest the advisability of presenting it in the exact form in which it was finally laid before the commission. I therefore translate without comment the admirable report of the official Reporter, M. Henri Fromageot.

The commission had before it ten propositions, declarations, or amendments, presented by the Delegations of the United States, Austria-Hungary, Italy, Holland, Brazil, Denmark, Belgium and France, in the examination of which the commission spent, in whole or in part, not less than six of its sessions.

The proposition of the United States which required the absolute suppression of the right of capture except in case of carriage of contraband or of the violation of blockade, served as the basis of a profound discussion of the question of immunity. The proposition was, in the following terms:

"The private property of all citizens or subjects of the Signatory Powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or by the military forces of any of the said Signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers."

All the arguments in favor of immunity were sustained with an eloquence and a dialectical force difficult to surpass.

The American Delegation recalled the historical continuity of the Doctrine from Benjamin Franklin to President Roosevelt, from the negotiation of the Treaty of the United States with Great Britain in 1783 and the conclusion of the Treaty with Prussia in 1785, to the Treaty of 1871 with Italy, the efforts made in connection with the Declaration of Paris of 1856, the manifestations of public and parliamentary opinion in Germany, the examples furnished for more than forty years by the Italian Code for the merchant marine, the high authority of the greatest men in public life in England, the opinion of the numerous and eminent jurists in favor of the freedom of enemy commerce.

The analogy with the rules forbidding pillage in land warfare, the slight naval interest today in the destruction of com-

merce, the reasons of humanity, the unjustifiable trouble caused to transactions in which all neutrals are as much concerned as the belligerents themselves, the necessity of limiting the war to the organized military forces of the belligerents, without involving unoffending private persons, the risk of arousing the spirit of vengeance and reprisal, were put in a clear and striking light.

The impossibility of admitting that war must be prevented, or its end hastened by rendering it as terrible as possible, the slight influence of commerce and the world of affairs in causing or preventing war, the enormous increase of naval expenditure caused by the necessity of protecting commerce in case of war, nothing was omitted which could command attention.

The delegations of certain countries, notably Brazil, Norway, Sweden, Austria-Hungary, recalled the continuity of the doctrine, or policy, and adhered to the proposition of the United States.

China likewise unreservedly expressed approval. The German Delegation, while acknowledging its leaning towards the proposed immunity, expressed the reserve that its adoption depended upon a previous agreement about the problems raised by contraband of war and blockade. This opinion was shared by the Delegation of Portugal.

Finally, it should be stated that among the Powers expressing themselves as ready to adhere to the doctrine of the United States, a certain number, especially Holland, Greece, Sweden, did not conceal their doubts as to the possibility of reaching a unanimous agreement at present.

For reasons analogous to those expressed in the German reserves, the Russian Delegation remarked that, according to the Imperial Government, the question did not appear practically to be ripe; that its solution presupposed previous understanding and an experience still to be acquired; that in fact the actual status quo should be maintained for the present. Furthermore, it added, the fear of perturbations brought by war into commercial markets would prove an unquestionable guarantee for peace.

The impossibility of separating the question of immunity from that of commercial blockade, the character less cruel of the stoppage of commerce, compared to the massacres that war engenders, seemed to be determinative for the Delegation of Great Britain, which, however, declared that its Government would be ready to consider the abolition of the right of capture, if such an agreement would favor the reduction of armaments.

The Argentine Republic pronounced itself categorically for the maintenance of the right of capture. Colombia declared that, whatever the theoretical considerations that may be invoked in favor of the abolition of the right of capture, there

was in it an element of national defense the relinquishment of which was precluded by the care of its national interests.

In presence of these divergent views, praiseworthy efforts were made in view of securing the adoption of means apt to lessen the unwarranted rigors of the present practice.

Italy, while declaring in favor of maintaining the principle of immunity incorporated in its laws, expressed the desire that immediate measures might be presented and discussed before the close of the discussion, in case the principle of immunity could not yet be adopted by the Conference.

Brazil proposed that, subordinated to an agreement upon the immunity, which it hoped might be reached, the powers agree to apply to maritime war and to private property on the seas the dispositions of Articles 23, 28, 46, 47 and 53 of the Convention of 1899, on the laws and customs of land warfare.

Belgium proposed that instead of striving for a result that had little chance of being reached at this time, the States should agree to diminish the rigors of capture by substituting for confiscation simple seizure or sequestration, in order to release the crews, to prohibit the destruction of prizes, and establish finally a series of rules respecting the rights of belligerents, in maritime warfare, to the private property of the enemy.

In the same spirit, the Dutch Delegation, after having proposed that every ship bearing a passport certifying that it will not be used as a war-vessel be exempt from capture, announced its acceptance of the project presented by the Delegation of Belgium under reservation of some modifications.

Finally the French Delegation expressed its sympathy for the liberality of the proposed doctrine, and declared its readiness to pledge its support if a unanimous agreement could be reached, but as this agreement did not now seem possible and depends upon the settlement of other equally delicate questions the French Delegation proposed to subordinate the maintenance of the present practice to the respect of the conditions of modern war between State and State. The Delegation stated that within these limits and from the point of law and equity, the obstruction or stoppage of enemy commerce as a means of suspending the economic animation of the adversary, is perfectly justifiable. It offers a powerful means of coercion whose legitimacy requires only that it be not a means of profit to individuals. Moved by these considerations a twofold recommendation was proposed in order to render general the abolition of the ancient custom of the share of prize money given to the crew of the captor, and to put upon the States a share of the losses resulting from capture.

It was in these conditions that the vote was taken upon this important question.

The proposition of the United States of America (immunity)



put first to vote, received from the forty-four States represented, 21 yeas, 11 nays, 1 abstention, eleven states not responding to the roll-call.

In the absence of a number of votes sufficient to ensure a unanimous agreement or at least an accord well-nigh general, the commission passed to the Brazilian proposition (*assimilation of naval to land warfare*). The vote to take it into consideration, having resulted in a fairly equal division of the votes cast, and in numerous absentions, the Delegation of Brazil withdrew its proposition.

The Belgian proposition (*substitution of sequestration for confiscation*) after having received a majority in favor of its consideration was unable, in the discussion of its articles, to obtain what could be deemed a sufficient vote in its favor, and the royal delegation asked that it be withdrawn from consideration.

Before the diversity of opinion thus expressed and the hope of concentrating the votes on a single formula, the President of the Commission proposed to make the recommendation that in future at the beginning of hostilities, the Powers declare of their own accord if and in what conditions they have decided to renounce the right of capture.

But, here again, objections were raised from various quarters and the compromise *voeu* was withdrawn.

The commission was thus obliged to express its opinion, in the final result, upon the twofold *voeu* proposed by the French Delegation (*suppression of individual shares of prize-money, participation of the State in the losses suffered by capture*). This *voeu* notwithstanding an amendment of Austria-Hungary likewise resulted only in an indecisive vote and in numerous abstentions.

Such is the summary of this long discussion of one of the most important questions of the program of the commission. I have endeavored to make it true, without, however, imposing upon your time. I wish I could have better expressed the profound impression left in each one of us by the beautiful addresses which it was our privilege to hear. If the maintenance of the present state of affairs seemed to result necessarily from this discussion, it is permitted to hope with the eminent first Delegate of Belgium, His Excellency M. Beernaert, that a future agreement is not impossible.<sup>1</sup>

## 2. CONTRABAND

The subject of contraband was necessarily and intimately connected with the immunity claimed for enemy property,

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, pp. 245-250.

because articles falling within the definition of contraband were to be expressly excluded from the benefit of the immunity. In the same way, vessels running a blockade and their cargoes were beyond the letter as well as the spirit of the proposed immunity. M. Ruy Barbosa was therefore far from wrong when he proposed to adjourn the vote on the immunity until after the consideration of contraband and blockade, and Marschall von Bieberstein was eminently justified in conditioning his approval of the proposed immunity of private property upon an agreement upon contraband and blockade.<sup>1</sup>

Events showed, however, that the separate and previous discussion of immunity on principle was justified, because the commission failed to reach any conclusions upon contraband and blockade, except that they were difficult in themselves and too complicated to be codified at the Conference.

First of contraband. The general treatment and its three-fold division by Grotius still remain, says Hall, the natural framework of the subject. For this reason I quote the text of Grotius, and an approval of it from an authoritative judgment of the Supreme Court of the United States, before giving in brief and summary form the various proposals made in the commission for revision and modification of the existing doctrine, including the radical proposal made by Great Britain for its abolition.

First of Grotius, who says in the fifth chapter of the third book of his immortal work on International Law:

But the question often arises, what is lawful against those who are not enemies, or will not allow themselves to be so called, but

<sup>1</sup> The intimate connection between the immunity of private property of the enemy and the question of contraband and blockade was not lost sight of by the friends and opponents of the doctrine in the First Conference. For example, Dr. White says in his *Autobiography*:

"Discussing the question of the immunity of private property, not contraband of war, on the high seas, I find that the main argument which our opponents are now using is that, even if the principle were conceded, new and troublesome questions would arise as to what really constitutes contraband of war; that ships themselves would undoubtedly be considered as contraband, since they can be used in conveying troops, coal, supplies, etc."—Vol. II, p. 289.

who provide our enemies with supplies of various kinds? This has been a point sharply contested, both anciently and recently; one party defending the rigorous rights of war, the other, the freedom of commerce.

In the first place, we must make a distinction as to the things supplied. For there are some articles a supply of which are useful in war only, as arms; others which are of no use in war, but are only luxuries; others which are useful both in war and out of war, as money, provisions, ships and their furniture. In matters of the first kind, that is true which Amalasuintha said to Justinian, that they are of the party of the enemy who supply him what is necessary in war. The second class of objects is not a matter of complaint.

In the third class, objects of ambiguous use, the state of the war is to be considered. For if I cannot defend myself except by intercepting what is sent, necessity as elsewhere explained, gives us a right to intercept it, but under the obligation of restitution, except there be cause to the contrary. If the supplies sent impede the exaction of my rights, and if he who sends them may know this; as if I were besieging a town, or blockading a port, and if surrender or peace were expected,<sup>1</sup> he will be bound to me for damages.

How thoroughly the passages quoted from Grotius express the theory and practice of the United States will appear from the following excerpt from the judgment of Chief Justice Chase in the case of the *Peterhoff* (1866, 5 Wallace, 28, 58) arising out of the war between the States.

The classification of goods, says the learned Chief Justice, as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable, but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military persons in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes.

Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

<sup>1</sup>De Jure Belli ac Pacis, lib. iii, c. i, §5.

It is to be noted that contraband is neutral property, and, as distinguished from enemy property, is not liable to seizure and confiscation unless exclusively or properly susceptible of warlike use, and its shipment to the enemy enables him to prosecute and continue the war. Trade in contraband is not forbidden by international law to the neutral subject or citizen, but its unneutral character is so far recognized that the belligerent may intercept and confiscate it. The trade is thus permitted, but subject to the risk of the shipper. The gist of the offense is the injury to the belligerent from the nature of the goods conveyed. Therefore, the vessel is conducted to a port of the captor where the articles of contraband are duly condemned, that is confiscated, but the vessel is liberated with loss of time, freight and expenses. If, however, the vessel is privy to the transaction, or if vessel and cargo belong to the same owners, vessel and cargo share the same fate. Innocent articles on board are known by the company they keep, but "escape the contagion of contraband" to quote Lord Stowell, if the property of a different owner.<sup>1</sup>

With the deposit of the articles at the port of destination, the transaction is completed, and the vessel has been purged, as it were, of the offense. There is nothing to intercept and neither the proceeds of sales can be touched nor the vessel seized.<sup>2</sup>

It is thus seen that the injury to the belligerent consists in delivering the goods to the enemy port and this he is permitted to prevent. The question naturally arises as to when the attempt begins so that the belligerent may intervene. Anglo-American jurisprudence answers the moment the vessel leaves territorial waters bent upon its hostile destination. The intent to transport the contraband coupled with the actual transportation are sufficient. It follows, therefore, that the original intent is not changed by touching at a neutral port, or even by transshipping the cargo in furtherance of the intent.

<sup>1</sup> *The Staat Embden*, 1 C. Rob. 31.

<sup>2</sup> *The Imina*, 3 C. Rob. 168.



The voyage is a unit, it is continuous in law though broken in fact. And the penalty is imposed irrespective of accidental circumstances, or attempt by transshipment to disguise the transaction.

From this brief outline it is apparent that the interests of neutrals and belligerent clash. It is at once obvious as Grotius pointed out, well-nigh three centuries ago, that the world is divided in opinion, "one party defending the rigorous rights of war, the other, the freedom of commerce." Neutrals naturally resent the delay and inconvenience to which the commerce of their citizens or subjects is subjected by the visit and search, capture and confiscation by the forces of either belligerent, simply because two or more nations are minded to break the peace with or without reason. The uncertainty of the subject—for articles are added to the lists of absolute and relative contraband, not as the result of general agreement but to suit the selfish interest or supposed conveniences of the belligerent—works a hardship on innocent shipments. It should not be forgotten that war creates a market not only for absolute contraband but for articles susceptible of an innocent as well as questionable use, and it seems as illogical as unreasonable that belligerents should destroy a market which their resort to arms has created. On the other hand, a free and untrammelled commerce in war materials and in articles capable of warlike use does supply belligerents with the sinews of war and thus tends to influence it, in rare and isolated cases, to prolong it. But men of affairs are impartial: they will supply either belligerent or both for a profit. National sentiment may prefer one belligerent to the other, but there is proverbially no friendship in business. Trade seeks its market. It may be that one belligerent offers a better opportunity; that geography and local situations play an unequal part, but that is the fault of the belligerent not of the neutral.

As the interdependence of nations is as marked, though not so pronounced as their independence, and as the conflict between two involves directly or indirectly all members of

the family of nations, it seems only just and reasonable that what concerns all should be settled by all, and that neither belligerent nor neutral should determine the matter for the other. The nations in conference should take measures in behalf of all without overlooking yet without giving undue weight to special interests.

In Mr. Hay's circular letter of October 21, 1904, it was stated that the question of the rights and duties of neutrals is of universal importance. Its rightful disposition affects the interests and well-being of all the world. The neutral is something more than an on-looker. His acts of omission or commission may have an influence—indirect but tangible—on a war actually in progress; whilst, on the other hand, he may suffer from the exigencies of the belligerents. It is this phase of warfare which deeply concerns the world at large.<sup>1</sup>

And the distinguished Secretary of State singled out as closely affecting the rights of neutrals "the distinction to be made between absolute and conditional contraband of war."<sup>2</sup>

At the date of this note the Russo-Japanese War was raging, and American shipping and commerce were being ground as it were, between the upper and nether mill-stone.

In his instructions to the American Delegation to the Second Conference, Mr. Root, said:

No rules should be adopted for the purpose of mitigating the evils of war to belligerents which will tend strongly to destroy the rights of neutrals, and no rules should be adopted regarding the rights of neutrals which will tend strongly to bring about war. It is of the highest importance that not only the rights but the duties of neutrals shall be most clearly and distinctly defined and understood, not only because the evils which belligerent nations bring upon themselves ought not to be allowed to spread to their peaceful neighbors and inflict unnecessary injury upon the rest of mankind, but because misunderstandings regarding the rights and duties of neutrals constantly tend to involve them in controversy with one or the other belligerent.

For both of these reasons, special consideration should be given to an agreement upon what shall be deemed to constitute contraband of war. There has been a recent tendency to

<sup>1</sup> See Vol. II, p. 171.

<sup>2</sup> Ibid.

extend widely the list of articles to be treated as contraband; and it is probable that if the belligerents themselves are to determine at the beginning of a war what shall be contraband, this tendency will continue until the list of contraband is made to include a large proportion of all the articles which are the subject of commerce, upon the ground that they will be useful to the enemy. When this result is reached, especially if the doctrine of continuous voyages is applied at the same time, the doctrine that free ships make free goods and the doctrine that blockades in order to be binding must be effective, as well as any rule giving immunity to the property of belligerents at sea, will be deprived of a large part of their effect, and we shall find ourselves going backward instead of forward in the effort to prevent every war from becoming universally disastrous. The exception of contraband of war in the Declaration of Paris will be so expanded as to very largely destroy the effect of the declaration. On the other hand, resistance to this tendency toward the expansion of the list of contraband ought not to be left to the neutrals affected by it at the very moment when war exists because that is the process by which neutrals become themselves involved in war. You should do all in your power to bring about an agreement upon what is to constitute contraband; and it is very desirable that the list should be limited as narrowly as possible.<sup>1</sup>

The attitude of the American Delegation was thus outlined in advance: to consider any proposal concerning contraband from the twofold standpoint of belligerent and neutral, and, while permitting the belligerent to protect himself against unrestricted trade, to narrow the list of contraband in the interest of the neutral as far as is consistent with the necessities of belligerent operations. The neutral of today may unfortunately be the belligerent of tomorrow, and the regulation is, so to speak, a two-edged sword. While warfare is permitted, belligerent supervision of neutral trade is essential, and we should not establish rules and regulations in behalf of the neutral which a belligerent will have every temptation to disregard. It is unfortunate, no doubt, but still a fact, to which we may not close our eyes, that military necessity overrides limitations incompatible with the effective conduct of hostilities, and a regulation which hampers the belligerent or deprives

<sup>1</sup> See Vol. 11, pp. 195-196.

him of discretion in a crisis is apt to prove a dead letter. We must not forget that in the recent war between the States, the rigid application of the law of contraband with continuous voyages and the effective blockade of southern ports starved the South into surrender on the field of battle.

As a convinced neutral, however, we will not be astonished to learn that the American delegation proposed during the course of the Conference to suppress conditional contraband.

The discussion in the commission went to the existence of contraband as a system and the British delegation laid the axe to the root of the tree. The British proposition was thus worded:

In order to lessen the difficulties suffered by neutrals in case of war, the Government of his Britannic Majesty is ready to abandon the principle of contraband in case of war between the Powers signing a convention to this end. The right of visit shall only be exercised to establish the neutral character of the merchant vessel.<sup>1</sup>

The Conference recalled the classical line questioning the presents of the Greeks, for Great Britain has not been averse in times past to visit and search neutrals and subject vessel and cargo to capture and confiscation. Suspicion fastened upon the British definition of "auxiliary vessel" which seemed to take away with one hand what the other gave. The auxiliary, whether neutral or belligerent, was to be assimilated to a man-of-war and subject to be captured and destroyed without the intervention of a Prize Court, if

engaged in the transportation of sailors, munitions of war, fuel, provisions, water or any other kind of naval stores, or destined to make repairs, or carrying dispatches or information provided the merchant vessel is directly or indirectly under orders from the belligerent fleet. Any vessel employed in carrying troops shall be included in this definition.

In view of this proposal it cannot be said that the suspicion was wholly unfounded, but the British delegation withdrew

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. III, Fourth Commission, 1st session, p. 742.



the definition and the broad question of the abolition of contraband was thus before the commission.

Argentina, Belgium, Norway, Portugal and Switzerland, favored unreservedly the British proposition. Austria and Sweden approved it, but expressed a willingness to accept a less radical measure. It will be noted that the British allies belonged to the neutrals. The naval powers looked askance at the proposition of the Island Empire, dependent upon the neutral for supplies, with no railway to cross the border unhindered by a belligerent navy. Several counter propositions were therefore presented, all of which aimed to preserve contraband but to minimize the abuses of the system. For example, Germany proposed:

1. To prohibit commerce in articles exclusively destined to a warlike use (absolute contraband) as well as merchandise susceptible of such use directed to the forces of the enemy (conditional contraband) provided they be on board a vessel destined directly to an enemy port or occupied by the enemy, or to the armed force of the enemy, and provided further that the articles in question were expressly declared contraband;

2. That articles falling within the definition of conditional contraband were conclusively presumed to be such if directed to the authorities or agents of the belligerent or if directed to fortified places of the enemy or other places serving as bases to the belligerent;

3. That the list of contraband should be published or notified to neutral governments or their diplomatic agents;

4. That contraband is subject to confiscation, likewise the vessel, provided its owner or captain knew that the contraband was on board and that it formed more than half of the cargo.<sup>1</sup>

It will be noted that the destination of the vessel is made the test as well as the nature of the cargo, and that the doctrine of continuous voyage is rejected. The German proposition is, in the language of Grotius, the defense of the "rigorous rights of war" with a sop to the neutral in the doctrine of continuous voyage.

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. III, pp. 1156-1157.

The French proposition, on the other hand, was based upon the freedom of commerce, but limited in the interest of the belligerent. For example:

1. Trade in absolute contraband (enumerated in a list of thirteen subjects) is forbidden by the sole fact of the known existence of war;

2. Absolute contraband subjects to confiscation, and the ship may be confiscated if seizure is resisted or if the captain or owner knew or could have known the nature of the prohibited cargo;

3. Trade in articles not prohibited in the list of absolute contraband is permitted, but may be prohibited by previous notification through diplomatic channels of articles specified in the notification;

4. Confiscation of such articles is permitted if destined not merely to the enemy but really to military or naval forces or to service of the enemy State. If not so destined, the articles in question can only be seized upon payment of its value to the owner;

5. Destination to neutral port does not stamp the venture with neutral character when the belligerent only has access to the sea through this neutral territory.<sup>1</sup>

The last clause is an echo of the controversy at Lorenzo Marquez when the Boer Republic, shut in from the sea, used the Portuguese port for supplies. It is also interesting as a recognition of the test of the real and ultimate destination essential to continuous voyage.

The proposition of Brazil, based upon resolutions adopted by the Institute of International Law, retained absolute but rejected relative contraband; it recognized a right of pre-emption of certain articles (provisions, coal, raw cotton, uniforms) if directed to the enemy, and recognized the actual and ultimate destination of the cargo, not merely of the vessel, as the test. This proposition was not insisted upon; it was presented for consideration in case the British proposal should prove unacceptable.<sup>2</sup>

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. III, pp. 1157-1158.

<sup>2</sup> Ibid., pp. 1159-1160.

Finally the American delegation presented a proposition retaining absolute and conditional contraband, without a specification of the articles forming either, because in changing conditions it seemed inadvisable to adopt a hard and fast list. The neutral, however, should not be taken by surprise, and therefore the belligerent should publish the list of contraband and notify neutral governments before neutral trade should be restrained. The proposition consisted of the following three articles:

1. Absolute contraband shall consist of arms, munitions of war, provisions, and articles solely used for military purposes or for military establishments.

2. Conditional contraband shall consist of provisions, materials and articles which are employed for the double purpose of peace and war, but which by reason of their nature or special quality, their quantity or by their nature, quality and quantity are useful and necessary for military purposes and which are destined for the use of armed forces or the military establishments of the enemy.

3. The list of articles and provisions to be included in each of the above classes must be duly published and notified by the belligerents to neutral governments or their diplomatic agents, and no article shall be seized or confiscated as conditional contraband until such publication or notice has been made.<sup>1</sup>

The advantage of the American proposition to the belligerent is its elasticity, leaving him free to determine the list in the light of all the conditions and circumstances of the war. Its advantage to the neutral, which it shares in common with other projects, is the necessity of notice. The disadvantage to the neutral is the uncertainty in which it is left until it pleases the belligerent to arrange his list and publish it to the world.

Such were the various projects presented to the commission for its consideration—one of which proposed the total abolition of contraband; the others its retention in various and modified forms. Of Lord Reay's admirable address in support of the

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. III, p. 1160.

British proposition,<sup>1</sup> the official reporter, M. Henri Fromageot gives the following brief and adequate summary:

The British Delegation in developing the reasons of its proposition accentuated the fact that the prohibition of contraband is hardly reconcilable with the modern state of affairs. Formerly it was stated in the days of sailing craft, the voyage was rarely broken at intermediate ports. The articles of contraband were especially articles of absolute contraband. The destination of the vessel ordinarily sufficed to indicate the destination and the hostile character of the merchandise; the tonnage was relatively light, the exercise of the right of visit and search easy. The prohibition of contraband was effectual. Today, the discoveries of science have singularly increased the number of articles comprised in the name of conditional contraband; the prohibition to be useful must be stretched to the point of rendering the Declaration of Paris a dead-letter. Moreover, navigation by steam, with its numerous calling stations, has given rise to singular complications against which the theory of continuous voyages endeavors to contend, and, on the other hand, thanks to the improvement in the means of land transportation, contraband easily circumvents its prohibition; finally, the importance of the tonnage, the diversity of the cargo, the ignorance of the captain as to the whereabouts of the articles tend to render the visit and search difficult, the prohibition ineffective, and, in all cases to inflict upon neutral commerce a trouble disproportionate to the legitimate interest of the belligerent.<sup>2</sup>

Put to vote, the British proposition for the abolition of contraband received out of thirty-five votes, 26 for; 5 against; 4 abstentions.<sup>3</sup>

As the result of this favorable vote, the entire question was referred to the Committee of Examination, and, ultimately to a smaller sub-committee, in order to examine the British project and the various propositions previously mentioned in order to

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. III, Fourth Commission, 8th session, pp. 854-859.

<sup>2</sup> Report to the Second Conference by M. Henri Fromageot, Actes et Documents, Vol. I, pp. 257-258.

<sup>3</sup> States voting in favor: Argentine, Austria-Hungary, Belgium, Brazil, Bulgaria, Chili, China, Denmark, Santo Domingo, Spain, Great Britain, Greece, Italy, Mexico, Norway, Paraguay, Holland, Peru, Persia, Portugal, Salvador, Servia, Siam, Sweden, Switzerland.

States voting against: Germany, France, Montenegro, Russia; States abstaining: Japan, Panama, Roumania, Turkey.



frame a project acceptable to the commission. In the sub-committee Lord Reay stated that, as the abandonment of contraband had not been unanimously accepted, it was advisable to consider the other propositions based upon retention of contraband in order to reach a general agreement. The list of absolute contraband in the French proposal was taken as the basis of discussion and after a careful examination a list was drawn up and unanimously accepted. A difficulty thereupon arose that prevented further progress. Admiral Sperry on behalf of the United States objected to any list of conditional contraband, stating that commerce, other than in absolute contraband, should be free and unrestricted. Brazil, Chili and Great Britain, adhered to this view, while Germany, France and Russia opposed. Unable to agree upon this important matter the subject dropped. The only result of deliberations extending over several sessions was a list of absolute contraband which met with unanimous approval in the committee. The list, however, was not adopted by the Conference, owing to lack of agreement on conditional contraband, but it doubtless is of value as representing the expert opinion in the year 1907:

1. Weapons of all kinds, including sporting weapons and characterized parts;
2. Projectiles, cartridges of all kinds and their characterized separate parts;
3. Powders and explosives especially intended for warfare;
4. Gun carriages, caissons, limbers, military wagons, battery forges and their characterized separate parts;
5. Characterized military clothing and equipment;
6. Characterized military saddlery of all kinds;
7. Saddle, draught and pack animals utilizable in war;
8. Camp equipage and characterized detached parts;
9. Armor plates;
10. War ships and boats, and separate parts specially characterized as being only fit for use on board a ship of war;
11. Tools and apparatus exclusively intended for manufacturing war ammunitions, for manufacturing and repairing arms and military material whether land or naval.<sup>1</sup>

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, Actes et Documents, Vol. I, pp. 259-260.

## 3. BLOCKADE

Passing now to blockade, the same unfortunate result must be registered, namely inability to agree. The subject was simpler than contraband, but the differences proved equally irreconcilable.

The rule of international law permits a belligerent to blockade an enemy port and forbid all trade with it.<sup>1</sup> It is needless to say that this is an extreme right, irksome and borne with bad grace by the neutral, who may and constantly does question the existence of a blockade, and challenge the legal authority of the party which has undertaken to establish it. A belligerent engaged in actual war has a right to blockade the ports of the other belligerent, and neutrals are bound to respect that right. The blockade of a port is as legitimate and, in an era of naval warfare, as necessary and more advantageous than a siege by land. As is said by a most distinguished authority, at one time commander-in-chief of the Union forces in the field,

a siege is a military investment of a place, so as to intercept, or render dangerous, all communications between the occupants and persons outside of the besieging army; and the place is said to be *blockaded*, when such communication *by water*, is either entirely cut off or rendered dangerous by the presence of the blockading squadron. A place may be both besieged and blockaded at the same time, or its communications by water may be intercepted, while those by land may be left open, and vice versa.<sup>2</sup>

The reason for the practice is simple, namely, that the enemy is either starved into submission, or the injury to his resources, by the lack of commerce, leads him to lend a more willing ear to the persuasive voice of peace and self-interest.

<sup>1</sup> The right to blockade an enemy's port with a competent force is a right secured to every belligerent by the law of nations.—*McCall v. Marine Ins. Co.*, 8 Cranch 59 (1814).

<sup>2</sup> Halleck's *International Law* (3d ed. by Baker) II, 184, §3. Indeed the cases of the *Circassian* (2 Wallace 135) and the *Adula* (175 U. S. 361) held that a blockade may be made effectual by batteries ashore as well as by ships afloat.

Blockades are divided, by English and American publicists, into two kinds: (1) A simple or *de facto* blockade, and (2) a public or governmental blockade. This is by no means a mere nominal distinction, but one that leads to practical consequences of much importance. In cases of capture, the rules of evidence which are applicable to one kind of blockade, are entirely inapplicable to the other; and what a neutral vessel might lawfully do in case of a simple blockade, would be sufficient cause for condemnation in case of a governmental blockade. A simple or *de facto* blockade is constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts, it ceases when they terminate; its existence must, therefore, in all cases, be established by clear and decisive evidence. The burthen of proof is thrown upon the captors, and they are bound to show that there was an actual blockade at the time of the capture. If the blockading ships were absent from their stations at the time the alleged breach occurred, the captors must prove that it was accidental, and not such an absence as would dissolve the blockade. A *public*, or governmental blockade, is one where the investment is not only actually established, but where also a public notification of the fact is made to neutral powers by the government, or officers of state, declaring the blockade. Such notice to a neutral State is presumed to extend to all its subjects; and a blockade established by public edict is presumed to continue till a public notification of its expiration. Hence the burthen of proof is changed, and the captured party is now bound to repel the legal presumptions against him by unequivocal evidence. It would, probably, not be sufficient for the neutral claimant to prove that the blockading squadron was absent, and there was no actual investment at the time the alleged breach took place; he must also prove that it was not an accidental and temporary absence, occasioned by storms, but that it arose from causes which, by their necessary and legal operation, raised the blockade.<sup>1</sup>

As municipal law does not forbid neutral trade with a blockaded port, although the Law of Nations undoubtedly does subject neutral property in such a case to capture and confiscation,<sup>2</sup> it is of great importance to the neutral to know the

<sup>1</sup> Moore; Digest of International Law, Vol. VII, p. 783, quoting Halleck, Int. Law (3d ed. by Baker) Vol. II, p. 189.

<sup>2</sup> It appears that principle, authority, and usage unite in calling on me to reject the new doctrine that, to carry on trade with a blockaded port, is or ought to be a municipal offense by the law of nations.—Per Dr. Lushington in *The Helen*, L. R. I Ad. & Ecc. 1, 1865.

precise moment when a venture lawful by municipal becomes illegal by international law. The blockade must be legally binding, because it is by virtue of the blockade that neutral property becomes liable to seizure; and it is equally obvious that the neutral must be taxed with knowledge of the blockade, otherwise we have an offense in international law without a criminal intent, and finally there must be some act done in furtherance of the intent formed or existing to violate the blockade.

In the language of a great authority whose decisions form the Golden book of prize law, I mean, of course Lord Stowell,

on the question of blockade three things must be proved: (1), the existence of an actual blockade; (2), the knowledge of the party; and (3), some act of violation, either by going in, or by coming out with a cargo laden after the commencement of blockade.<sup>1</sup>

If we add the word "attempt" to entry, the definition is as complete and accurate as possible with a few lines.

The blockade must be actual as distinct from fictitious, maintained by a force in position not by an inhibition on paper, so that the entry is blocked and the attempt to enter dangerous. To quote another distinguished authority, Sir William Grant,

the intention to shut up the port should not only be generally made known to the vessels navigating the seas in the vicinity, but that it was the duty of the blockaders to maintain such a force as would be of itself sufficient to enforce the blockade. This could only be effected by keeping a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island.<sup>2</sup>

A later admiralty judge has thus expressed himself:

The maintenance of a blockade must always be a question of degree—of the degree of danger attending ships going into or leaving a port. Nothing is further from my intention, nor indeed

<sup>1</sup> The *Betsey* 1 C. Robinson 92a, (1798).

<sup>2</sup> The *Nancy*, 1 Acton 57, (1799).



more opposed to my notions, than any retraction of the rule that a blockade must be sufficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night or fogs or violent winds, or occasional absence; that it is most difficult to judge from numbers alone. Hence, I believe that in every case the inquiry has been, whether the force was complete and present and if so, the performance of the duty was presumed; and I think I can safely assert that in no case was a blockade held to be bad, when the blockading force was on the spot or near thereto on the ground of vessels entering into or escaping from the port where such ingress or egress did not take place with the consent of the blockading squadron.<sup>1</sup>

The language of the courts was not always the practice of the admirals, and the undoubted right of blockade was perhaps more honored in the breach than in the observance. The history of blockade is largely a chronicle of abuse. It was easy and therefore of frequent occurrence, to announce that on and after such a day certain ports of the enemy, or perhaps the whole coast was closed to neutral commerce, and that any neutral vessel setting sail for the specified region would be lawful prize. It was, however, difficult to make this paper blockade good and effective in fact. The continental wars, springing out of the French Revolution, were periods of disorganization in which the armed hand blotted out even the semblance of right. Paper blockade was answered by paper blockade, until neutral commerce was either driven from the seas, or the neutral, harassed beyond endurance by decree and counter-decree, and finding embargoes and non-intercourse powerless to redress a series of wrongs and outrages, aggravated by impressment of its seamen, grasped the sword in self-defense as the only means of maintaining its just rights.

The fictitious blockades proclaimed by Great Britain and made the pretext for violating the commerce of neutral nations have been one of the greatest abuses ever committed on the high seas. During the late war they were carried to an extravagance which would have been ridiculous, if in their effects they had not inflicted such serious and extensive injuries on neutral

<sup>1</sup> Per Dr. Lushington in *The Franciska*, Spinks, 287.

nations. Ports were proclaimed in a state of blockade previous to the arrival of any force at them, were considered in that state without regard to intermissions in the presence of the blockading force and the proclamations left in operation after its final departure; the British cruisers during the whole time seizing every vessel bound to such ports, at whatever distance from them, and the British prize courts pronouncing condemnations wherever a knowledge of the proclamation at the time of sailing could be presumed, although it might afterwards be known that no real blockade existed. The whole scene was a perfect mockery in which fact was sacrificed to form and right to power and plunder. The United States were among the greatest sufferers; and would have been still more so, if redress for some of the spoliations proceeding from this source had not fallen within the provisions of an article in the Treaty of 1794.<sup>1</sup>

The abuse of the system led the Congress of Paris in 1856 to declare that "blockades in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prohibit access to the enemy's coast."

But the Declaration of Paris, in proclaiming effectiveness as a requirement of international law, left untouched and unsolved other and necessary parts of the problem. How is the effective blockade to be declared to the neutral nations and brought to the actual or constructive notice of the neutral shipper? Is the effective blockade violated by an attempt in the teeth of the blockading squadron, or is the intent to violate the blockade formed many miles distant in the home port sufficiently manifested to permit capture upon the high seas before an actual attempt has been made to break the blockade and enter the port? Is the ultimate destination of the cargo, as in the case of contraband determinative, so that transfer of cargo at a neutral port is without legal effect, provided the ultimate intent be to violate the blockade? Does the blockade when officially announced and proclaimed continue until it is officially removed, irrespective of the fact that the blockade has in fact ceased to exist?

These and other important questions were not settled by

<sup>1</sup> Moore's *International Law Digest*, Vol. VII, p. 797.

the Declaration of Paris. Their settlement is thus left to the municipal law of the various States, and cases arising under them have destroyed commerce, annoyed and embarrassed foreign offices, and after years of negotiation have found their way to mixed commissions for arbitration and settlement.<sup>1</sup>

These are questions worthy of a conference to promote peace by removing grounds of controversy. The Russian program enumerated blockade among the subjects for consideration, and the Fourth Commission undertook the settlement of the question without reaching agreement. Indeed, its failure was more marked and pitiable than in contraband. The underlying reason was, however, the same: the conflict of neutral and belligerent interests. The blockade of southern ports during the Civil War; the seizure and confiscation of vessels and their cargo before the port was reached; the extension of the doctrine of continuous voyage to blockade isolated the South and made its collapse on the field of battle a mere question of time. It is true that American theory and practice caused suffering to neutral nations, and either swept neutral commerce from the seas, or subjected it to visit and search, but the success of military operations involving, it may be, national existence, either required or justified it. Great Britain and the United States, for Anglo-American jurisprudence speaks the same language, were unwilling to accept the theory of the continent, which permits a neutral to approach the blockaded port, and requires the belligerent to note upon the papers of the blockade runner a warning not to attempt the offense and adjourn capture until the vessel thus warned should attempt to enter the port. The Anglo-American practice is severe, but supposing that the right of blockade is permitted and recognized, there seems no reason why a belligerent should permit, if the blockade is effective, neutral vessels to hover in the presence of a blockaded port, awaiting opportunity to steal into port during cover of fog and stress of weather, or during the temporary or accidental absence of a vessel or squadron.

<sup>1</sup> For the practice of the United States, see Moore's *International Law Digest*, Vol. VII, pp. 780-858.

The Law of Nations and its practice permit a belligerent to capture a vessel attempting to enter a blockaded port, and, while severe, it does not seem unjustifiable to capture the vessel the moment it is pursuing the intent even although at a distance from the port.

In order to harmonize and render uniform the law of blockade, the Italian Delegation on August 2, 1907, presented the following project to the Fourth Commission:

1. The blockade to be effective must be declared and notified;

2. The blockade is effective when maintained by a naval force really sufficient to prevent the entry and stationed in such a manner so as to create an evident danger for the vessels seeking to force the entry.

The blockade is not considered raised if stress of weather has forced the blockading squadron momentarily from their station.

3. The declaration of blockade must determine the beginning of the blockade, its limits by longitude and latitude, and the delay within which neutral vessels, which entered the port before the blockade, are permitted to leave.

4. The blockade must be notified to the authorities of the blockaded port and to the governments of neutral States.

If this notification has not been made or if the vessel approaching the blockaded port did not have knowledge of the blockade, the notification must be made to the vessel, by an officer of the blockading squadron, and entered upon the ship's papers.

5. A vessel shall not be seized as guilty of violating the blockade until it attempts to cross the lines of a binding blockade.

6. Vessels may enter a blockaded port in case of distress certified to by the commander of the blockading squadron.

7. The vessel seized for violation of the blockade can be confiscated as well as its cargo, unless the owner of the cargo proves that the attempt to violate the blockade was without his knowledge.<sup>1</sup>

A Brazilian amendment, while accepting the Italian proposition, sought to limit the blockade within certain fixed geographical lines;<sup>2</sup> to tax vessels, leaving port seven days

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. I, p. 261.

<sup>2</sup> The blockade is only effective in conditions mentioned in the Italian proposition (Article 2) when limited to ports, roadsteads, harbors, bays or other landing places on the enemy coast, as well as entries thereto.



after notification, with knowledge of the blockade; to require belligerents to notify changes of the blockade.<sup>1</sup>

The Brazilian was not inconsistent with the Italian proposition, but sought to give it greater definiteness to meet local conditions.

The American and British amendments admitted the definition of blockade and the requirement of notification but proposed the following substitute for Article 5:

Every vessel which, after the notification, sails for a blockaded port or place, or which attempts to force the blockade, is liable to seizure for the violation of blockade.<sup>2</sup>

Another amendment proposed the omission of "longitude and latitude" from the third article, and Great Britain, accepting the various American amendments, proposed in addition the substitution of "real" for "evident" in the first paragraph of Article 2, and the addition of the word "neutral" before "vessel approaching" in the second paragraph of Article 4.

As thus amended the Italian project would have been largely declaratory of Anglo-American practice, but would have been irreconcilably in opposition to the continental theory.

Referred to the Committee of Examination, a single session showed the hopelessness of agreement; for the price asked was the surrender of the Anglo-American law of blockade, built up by generations of practice and incorporated in the judicial decisions of Great Britain and the United States. When a question seemed difficult and especially when unacceptable, even although not over-difficult, a favorite method of closing debate was to suggest that the subject was not ripe for discussion. In this case the subject was indeed ripe for discussion and much needed settlement, but the Anglo-Saxon who

<sup>1</sup> The Conference shall fix a certain number of miles counted from the coast at low tide or by an imaginary line drawn between the extremities of the port or bay as well as from the said extremities along the coast, in order to limit the space in which the blockading squadron shall enforce the blockade.—*La Deuxième Conférence Internationale de la Paix*, 1907, Vol. III, p. 1168.

<sup>2</sup> *Ibid.*, p. 261.

has made so much of the law of blockade was not ready to *surrender*. Therefore, Sir Ernest Satow stated roundly that:

Given the difference between the two systems of practice which may be designed by the names of the Continental and Anglo-American systems, we believe that it is impossible for the moment to reach a compromise. As his excellency, the President of the Fourth Commission (de Martens) has indicated, the question of blockade is not literally included in the program proposed by the Russian Government. Therefore the British Government did not furnish us with instructions on this subject before the meeting of the Conference. Time is lacking too for a thorough examination of the question, and to attempt a reconciliation of the divergent views of the two schools. In order to arrive at a compromise, concessions must be made on both sides for which neither party is perhaps prepared. It therefore appears to our delegation preferable to suspend the discussion of this question.<sup>1</sup>

The Committee of Examination shared the view voiced by the British delegation, and the subject of blockade was relegated to a more favorable future.

#### 4. THE DESTRUCTION OF NEUTRAL PRIZES

With contraband and blockade the question of the sinking of neutral prizes is connected in no uncertain way, because, if a neutral vessel does not carry contraband, and if not destined to a blockaded port, it is not subject to seizure, much less to confiscation, although it may be annoyed by visit and search in order to ascertain and establish its neutral character. But the question—like the immunity of private property of the enemy—may be considered separately and on principle. There is no adjudged case in British or American courts on the question, although dicta of Lord Stowell, torn from their natural connection and surroundings have been dragged into the service. It cannot be said, however, that we are without precedent, for the Russo-Japanese War furnished more than one example of a belligerent sinking a neutral which it was unable

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Actes et Documents, Vol. III, Committee of Examination, Fifth Session, p. 965.

to send into port, either because the prize was unseaworthy or the port was far away.<sup>1</sup> This may be a convenient method for a buccaneer to destroy booty he cannot carry away, and it may be permitted in exceptional cases to sink an enemy prize rather than to send it into port for condemnation; but it is inconsistent with the barest right of a neutral to sink property whose guilt has not been established by a judicial proceeding. The Confederate *Semmes* was accused of turning his quarter deck into a Prize Court, and decreeing the destruction of property he could not use or send into port, but *Semmes* did not prey upon neutral commerce. The title to enemy property passes by capture; the title to neutral property by adjudication, and the necessity, recognized even by the partisans of destruction, to preserve the papers and have the confiscation of the vessel decreed by a Prize Court, is in reality a recognition of the unlawfulness of their claim. The statement that a vessel sacrifices its right to judicial decision by unneutral conduct, is to assume the guilt which results from a judicial proceeding. The admission that unlawful seizure and destruction entitle the neutral to compensation and indemnity through diplomatic channels, is a claim to commit an unlawful act subject to payment when convenient or forced by pressure from a neutral government. We do not permit this in private and there is no reason to permit it in public law. The further plea that many countries do not possess ports near the scene of action to which the prize can be sent is a conclusive reason why the vessel should be released, and if it be finally said that prohibition to destroy the neutral prize puts a belligerent at a disadvantage with Great Britain, for example, which possesses ports all over the world, the reply is that Great Britain has acquired them at a vast expense of blood and treasure, and that there is no reason why the British taxpayer should share or renounce an advantage at the instance of a jealous rival. One solution of the difficulty would be to

<sup>1</sup> For the cases of the sinking of the *Thea* (German) and the *Knight Commander* (British) by the Russians in July, 1904, see Hershey's *International Law and Diplomacy of the Russo-Japanese War*, pp. 143-159.

permit the neutral prize to be sent to a neutral port and there lie until condemned or released by judicial procedure in the court of the captor, as is proposed in Article 23 of the convention concerning rights and duties of neutrals in naval war; but there seems no reason why a neutral should, without his own affirmative act, have his harbors and ports made the basis of enemy operations and filled with prizes.

The seizure of property upon suspicion, its confiscation after judicial decision is sufficient injury to the neutral and neutral commerce; to ask that he permit his property to be sunk, with the promise of a trial or compensation in the distant future, is to ask the neutral to renounce the rights and privileges of neutrality, not merely in the interest of the belligerent, but to be a party to the introduction of a principle unknown to international law and unworthy to be incorporated in it. It is a stranger to the Law of Nations; conceived in sin, it is begotten in iniquity and known only in malpractice. When challenged to justify its extension to international law, Dr. Kriege cited a disputed dictum of Lord Stowell and a statement of English law in an American text-book, but Sir Ernest Satow and General Davis on behalf of Great Britain and the United States immediately repudiated the doctrine. The partisans thereupon forsook the uncongenial field *de lege lata* and displayed their ingenuity in the more pleasing prospect *de lege ferenda*.

The subject figured in the program by reason of "malpractice" in the Russo-Japanese War, and friend and opponent presented projects. The discussion was animated both in commission and in the Committee of Examination, and if no temper was lost nothing was gained. The result as in contraband and blockade, was a failure to agree. Russia presented the case for the protagonists of the doctrine; Great Britain and the United States led the opposition. The project of the partisans as presented by Russia was in the following terms: The destruction of a neutral prize is forbidden except in cases in which its preservation would compromise the security of the captor's vessel or the success of its operations. The captor can only use the right of destruction with the greatest reserve,



and must previously transship the crew, and, as far as possible the cargo, and preserve in any event all the papers on board and other objects necessary to the judgment of a Prize Court and the establishment of indemnities in a proper case.

It is understood that in case of seizure or destruction condemned as illegal by a Prize Court or competent authorities, the parties in interest have an action or claim for damages.

The British and American projects were brief, to the point, identical in meaning. First the British formula:

The destruction of a neutral prize by the captor is forbidden. The captor must release every neutral vessel which he cannot send before a court of prize.

The American was briefer and a trifle more pointed:

If for any reason whatever, a neutral captured vessel cannot be brought in for adjudication, it must be released.

Sir Ernest Satow showed that the Institute of International Law had given great consideration to the subject in its sessions at Wiesbaden (1881) and Turin (1882) only to reject the doctrine. Dr. Kriege laid great reliance upon Professor Holland's letters to the Times that the doctrine either is or has been allowed by the laws of France, United States, Japan, Russia, and recognized by Germany, but whether recognized or not in the past, military necessity required it in the future.

Article 23 of the convention concerning the rights and duties of neutrals in naval warfare recognized the right of the neutral to permit an enemy's prize to remain in its ports pending adjudication in the captor's country. This article had doubtless much influence upon the favorable vote of the committee upon the Anglo-American project (11 for, 4 against; no abstentions), as was expressly stated by Count Tornielli of the Italian delegation. The Russian project permitting destruction received in committee a slight majority (6 for, 4 against, 7 abstentions).

There was no middle ground, although Article 23 of the convention on the rights and duties of neutrals in naval war may tend to preserve the prize in the absence of any other agree-

ment between the nations. But Great Britain, Japan, and the United States opposed this article and have excluded it from their ratification. The result is a profound divergence of opinion with no immediate or prospective solution of the difficulty. It is safe to assume that Great Britain, Japan and the United States will not permit their property to be sunk at the will and pleasure of an officer acting under excitement, and it is equally safe to predict that the partisans of the doctrine will practice it on less powerful neutrals.

Great Britain has invited the leading maritime nations to a Conference at London in the fall of 1908, and the subjects of Contraband, Blockade and the Destruction of Neutral Prizes figure in the program.

Notwithstanding the divergence between Continental doctrine and Anglo-American jurisprudence a compromise is possible if the representatives of the Powers earnestly desire to reach an agreement. The renunciation of conditional contraband is in the interest of neutrals and it is not improbable that prospective belligerents may consent to the sacrifice. The limitation of capture to the neighborhood of the blockaded port would be the surrender of an extreme right not often exercised because most captures are made within range of the blockaded port. The retention of destination of the cargo rather than the ostensible destination of the vessel is in the interest of fair-dealing, and the doctrine of continuous voyages in the matter of contraband has commended itself to such a conservative and enlightened body as the Institute of International Law. The principle of continuous voyages as applied to blockade has not met with general approval and might be renounced, although the doctrine was highly serviceable in the Civil War.

The shipper will conform to any system provided it is certain and known in advance and certainty is more valuable to commerce than scientific precision or theoretical correctness. It is in the interest of belligerent and neutral that one and the same law should prevail, whether it be the Continental or the Anglo-American system. Special interests may well

yield to the universal good, and it cannot be doubted that a single and clearly defined system would meet with general approval, even although favorite doctrines be renounced and national practice be modified. It is not improbable that the Maritime Conference may reach a workable compromise on contraband and blockade; but the legalization of the destruction of neutral prize before condemnation is neither in the interest of the neutral nor conformed to the elemental principle of justice, that prescribes a hearing before condemnation.<sup>1</sup>

<sup>1</sup> *POST SCRIPTUM.* The Declaration of London, adopted by the Naval Conference on February 26, 1909, contains important provisions relating to Contraband (Articles 22-24); Blockade (Articles 1-21), and the Destruction of Neutral Prizes (Articles 48-54).

In regard to contraband, the Declaration adopts substantially The Hague list of Absolute Contraband (Article 22), maintains Conditional Contraband (Article 24), and enumerates an important list of free articles (Article 28); permits additions to list of absolute and conditional contraband if properly notified to neutral powers (Articles 23, 26); retains continuous voyage for absolute contraband (Article 30); abolishes it for conditional contraband (Article 35), but recognizes the doctrine for countries having no seaport. (Article 36.)

The provisions concerning blockade are a happy compromise between the Anglo-American and Continental system, by which capture is allowed within an undefined and therefore unlimited radius of action (Article 17). Continuous voyage is renounced (Article 19), but as the blockade may be made effective according to Anglo-American practice, the sacrifice of the doctrine is more apparent than real.

In the matter of neutral prizes, the general principle is recognized that they cannot be destroyed (Article 48), but the Declaration permits destruction of a neutral vessel subject to confiscation if observance of Article 48 would compromise the security of the man-of-war or the success of the operations in which it is actually engaged (Article 49). Ample provision for indemnities and judicial remedy make the exception not unacceptable (Articles 50-54).

The British Government will issue an official Report on the Naval Conference of London containing the proceedings in full. For the text in the Declaration, see supplement to the July number of the *American Journal of International Law*. (1909.)

## CHAPTER XVI

### RECOMMENDATION FOR A THIRD PEACE CONFERENCE

#### CONCLUDING REMARKS

The First Conference of 1899 was an experiment for which there were precedents, although there was perhaps no single precedent like it in all respects. Congresses or conferences have been familiar since the Congress of Westphalia, which may be said to mark the conscious beginning of modern international relations, and at various times conferences or congresses have been called, usually at the end of war, to settle the terms of peace. Familiar examples of peace conferences, in the sense that they were assembled to establish peace, are Westphalia, 1648; Utrecht, 1713-1714; Vienna, 1814-1815; Paris, 1856; and Berlin, 1878. Each one of these conferences, to use a single expression—for congress and conference are practically synonymous—was preceded by a war and owed its existence to war, although its purpose was not to devise means for establishing peace in general, but to conclude a special peace by adjusting the controversy out of which the war sprang. In some of the later conferences—notably the Congress of Paris in 1856—questions of a general nature were discussed and an agreement reached upon questions of maritime law, but the codification of maritime warfare begun by the Congress of Paris was incidental to its calling. The fact, however, that the congress succeeded in abolishing privateering, in requiring that blockades be binding to be effective, that the neutral flag covers enemy's goods, and that neutral goods are safe in enemy bottoms furnished a precedent for a conference which should deal with matters of a general interest, even although its labors should be restricted to a small portion



of international law. The usefulness of the conference was thus demonstrated, and in recent times conferences have been called with no war immediately preceding their call, although such conferences have dealt with disputes arising out of war or have sought to prevent disputes by settling in advance usages and customs of war. Thus, the Geneva Conference of 1864 called by Switzerland to consider the treatment of sick and wounded upon the battlefield was not preceded by war in the sense that its mission was to end hostilities, although the neglect of the sick and wounded at Solferino in the war of 1859 between France and Austria prompted the call. In the same way the Geneva Conference of 1868 was not a war conference, although its convocation was due to the needless loss of life in the naval battle of Lissa between Italy and Austria in 1866. The conference sought to extend to naval war the beneficent principles of the Geneva Convention of 1864 concerning the sick and wounded in war on land.

The conference called by Alexander II and which formulated the Declaration of St. Petersburg of 1868 was not immediately preceded by a war, although its results were limited to the restriction of the means of destruction in future warfare. In like manner the Brussels Conference of 1874 was not convoked by belligerents or by powers on behalf of belligerents, although the Franco-German War of 1870 was undoubtedly the cause for its convocation.

This second group of conferences may be called peace conferences in that they met in times of peace, but the program dealt exclusively with the usages and customs of war.

A third type is the conference meeting in time of peace to consider the means whereby peace may be preserved, and of this class the Kongo Conference of 1884-1885 at Berlin, and the Pan-American Conference of 1889-1890 at Washington are familiar illustrations. The Berlin Conference dealt with the Kongo question, and by regulating traffic upon the Kongo and its tributaries, by establishing boundaries of the States claiming territory in the neighborhood of the Kongo, and adopting rules for the occupation of Africa, removed a fertile

source of conflict. The Conference of Berlin was not preceded by a war, nor was it followed by one; it was, in the highest sense of the word, preventive. The Pan-American Conference of 1889-1890 due to the initiative of Mr. James G. Blaine, was assembled in the interest of peace. Its purpose was to draw the American States closer together, and, by means of arbitration, to provide a substitute for war.

It is thus seen that the idea of an international conference was familiar both to the old and the new world, and that the Peace Conference of 1899 was but the culmination of, rather than the first step in the development. The war conference showed not only that peace might be established by a meeting of the powers, but also that matters of general interest might be discussed and regulated at such a conference in addition to the questions at issue between belligerents. The second class furnished a precedent for a conference called in time of peace to regulate the laws and customs of warfare, whereas the third class demonstrated the usefulness of a conference to discuss and regulate questions disconnected from war or only remotely connected with it. The First Hague Conference furnished the priceless precedent of a conference meeting in time of profound peace to discuss not merely questions of armament and the laws and customs of war, but at one and the same time the means whereby conflicts between States might be settled by a resort, not to arms, but to good offices, mediation and arbitration.

The First Conference was therefore rather a development than an experiment, although if the labors of the Conference had failed to justify its call, it is doubtful whether a second conference would have met in the near future. The success, however, of the experiment seems to have made the Conference an institution, and the action of the Second Conference in providing for a successor leads to the hope that conferences will regularly assemble in response to an enlightened and insistent public opinion. The First Conference looked forward to a successor; the Second Conference provided a time within which its successor should meet. The President of the First

Conference, M. de Staal, is reported by Dr. Andrew D. White, in his interesting autobiography, to have considered a call for a second conference as probable within a year from the adjournment of the first;<sup>1</sup> but the war in South Africa between Great Britain and the Transvaal and the Russo-Japanese war of 1904 postponed the call. At the request of the Interparliamentary Union, held at St. Louis in 1904, President Roosevelt sounded the Powers as to their willingness to attend a conference, and the conclusion of the Russo-Japanese war, brought about by the good offices of President Roosevelt, enabled Russia to assume the initiative for a second conference, which assembled at The Hague on the 15th day of June, 1907, and adjourned on October 18 of the same year.

That the First Conference had in mind a successor is evidenced by the fact that it expressed "the wish that the questions of the rights and duties of neutrals may be inserted in the program of a conference in the near future;" that the "proposal which contemplates the declaration of the inviolability of private property in naval warfare may be referred to a subsequent conference for consideration;" that the "proposal to settle the question of the bombardment of ports, towns, and villages by a naval force may be referred to a subsequent conference for consideration." It will be noted that the First Conference did not indicate any date at which the future conference should assemble, whereas the Second Conference, in addition to providing subjects for the program of the Third Conference, specified that it should meet on or about the year 1915. The conference, however, did not attempt to perpetuate itself by declaring that conferences should be held in future at regular and recurring intervals, but limited itself to a recommendation for a third conference to meet at a specified date. It might have gone further and stated that the periodic assembling of a conference com-

<sup>1</sup>"A delegate also informed me that in talking with M. de Staal the latter declared that in his opinion the present conference is only the first of a series, and that it is quite likely that another will be held next winter or next spring." Autobiography of Andrew D. White, Vol. II, p. 272.

mended itself to its judgment; but as the conference was not a legislative body, and if it had been could not have bound its successor, much less the sovereign States represented at the Conference, it wisely restricted itself to a recommendation that a third conference should be held. Public opinion in the United States was outspoken for a stated, periodic conference, and the American delegation was instructed by the Secretary of State to favor the holding of further conferences within fixed periods.<sup>1</sup>

Pursuant to these instructions the American delegation succeeded, by means of great tact and conciliation, in persuading M. de Nelidow, first Russian Delegate, and President of the Conference, to introduce of his own motion the following recommendation, which was unanimously adopted:

Finally, the Conference recommends to the powers the assembly of a third peace conference, which might be held within a period corresponding to that which has elapsed since the preceding conference, at a date to be fixed by common agreement between the Powers, and it calls their attention to the necessity of preparing the program of this Third Conference a sufficient time in advance to insure its deliberations being conducted with the necessary authority and expedition.

In order to attain this object the Conference considers that it would be very desirable that, some two years before the probable date of the meeting, a preparatory committee should be charged by the Governments with the task of collecting the various proposals to be submitted to the Conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a program which the Governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested. This committee should further be intrusted with the task of proposing a system of organization and procedure for the Conference itself.

A careful reading of the recommendation shows that the Conference is to be held "within a period corresponding to that which has elapsed since the preceding Conference"—that is to say, within a period of eight years; that the date is to be fixed "by common agreement between the powers,"

<sup>1</sup> See Instructions, Vol. II, pp. 184-185.



and that the program of this Third Conference is to be prepared "a sufficient time in advance to insure its deliberations being conducted with the necessary authority and expedition." The powers were willing to recommend a third conference, but they were not willing to specify the exact date. They felt it, however, to be essential that the program should be prepared in advance and communicated to the participants in ample time to enable them to mature their views, and to present them in finished form at the opening of the Third Conference. Without reflecting upon any Power or group of Powers, the Conference felt that much time was lost by a failure to present at the opening the various projects for which consideration was requested, and that the delay involved in communicating with the home governments was a waste of time for which there was neither a reason nor a compensating advantage.

The Second Conference felt that no one Power should be burdened "with the task of collecting the various proposals to be submitted to the Conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a program" which should include the proposals collected and ripe for submission. For this purpose a preparatory committee was to be appointed by agreement of the various Governments "some two years before the probable date of the meeting" in the belief that the tentative program might be examined, approved, disapproved, or modified by the various Powers within a period of two years. But a great step in advance was taken by the Conference in providing that "this committee should further be intrusted with the task of providing a system of organization and procedure for the Conference itself," the obvious meaning of which is that the committee is to propose a system of organization and procedure for the Conference which will meet the approval of the invited and participating Powers, so that the future conferences will be no longer be officered and dominated by any one Power. The Conference of 1899 was due to the enlightened statesmanship of Nicholas II; and it was in no uncertain degree his conference, for the First Delegate of Russia was

president, and the presidents of the various commissions were chosen directly or indirectly by Russia. The Second Conference was not so directly the work of the Czar, for it was, as stated in the very first lines of the final act, "proposed in the first instance by the President of the United States of America;" but the President of the Conference was the First Delegate of Russia, and the officers of the Second, like the officers of the First, were chosen by Russia and notified to the Second Conference for approval. The Third Conference is, however, to have its "organization and procedure" designated in advance by a committee, which shall represent not merely one Power but the Community of Nations. The Conference, therefore, is to be international not merely in name but in fact, and its organization and procedure are to be the result of the wit and wisdom of the many, not of an individual power, whether it be the august initiator of the Conference itself or of the individual who happens to propose its calling. In becoming an institution the child has outgrown tutelage.

The Conferences at The Hague have already accomplished much for international law, and it cannot be doubted that their successors will continue the work which they have so admirably begun. The First Conference raised good offices and mediation to the dignity of an institution; provided for the ascertainment of disputed facts likely to produce serious consequences by an international commission of inquiry; set the seal of its approval upon arbitration; devised machinery by which a temporary tribunal might be chosen from a permanent panel of judges, and adopted a code of procedure for the trial and determination of cases submitted to the tribunal. The First Conference also codified the laws and customs of warfare on land, extended to maritime warfare the beneficent provisions of the Geneva Convention and, if it did not provide for the limitation of armaments, it at least discussed seriously and profoundly the question. The Second Conference revised each of these conventions, thus rendering them more worthy of approval; it accepted with unanimity the principle of compulsory arbitration and, in a concrete case, namely, the collection of con-

tract debts, it restricted the use of force and bound the nations to arbitration. It laid the foundations of a Court of Arbitral Justice, to be composed of judges acting under a sense of judicial responsibility, in which the various systems of jurisprudence and the various languages shall be adequately represented; it actually created an International Court of Prize in which the validity of an alleged capture shall be determined by an international tribunal composed of competent, trained judges, in which the belligerents shall be represented, but in which the neutrals shall decide the question at issue. The Conference further codified the laws and customs of war and, by prescribing belligerent duties and recognizing neutral rights as well as duties, extended the empire of law. It is impossible to discuss international law without a reference to The Hague Conferences; it is impossible to conduct the foreign relations of nations without quoting the provisions of The Hague conventions; it is almost impossible to perform the duties of citizenship without a knowledge of The Hague Conferences and their positive results.

The positive results of the Conferences are, therefore, of such importance that they mark an epoch in international law and its development. But however worthy of consideration, they are relatively unimportant in comparison with the institution of the periodic conference, which unites for a brief space the representatives of the world and legislates, although *ad referendum*, in the common interest. The work of one conference is far from perfect, and each of the three conventions of the First was revised in the light of theory and practice by the Second. What one conference makes another may unmake, if it fails to justify itself; or improve, if its defects have been uncovered by practice and experience. The work of the Second Conference will no doubt be subjected to criticism and forced to justify itself; a third conference will undoubtedly revise it in principle as well as in detail. The experience of the many will supplement the wisdom of the few, and the coöperation of the nations will produce an international code fitted to meet the needs of the nations because the outcome of

their needs and experience. Each conference is but a step in advance, it is but a link in the chain which, encircling the world will bind the nations closer together, if it does not confederate them.

In this view, positive results are of minor importance; its partial successes, indeed its failures, evidence progress. As aptly said by our Secretary of State, Mr. Root:

The question about each international conference is not merely what it has accomplished, but also what it has begun, and what it has moved forward. Not only the conventions signed and ratified, but the steps taken toward conclusions which may not reach practical and effective form for many years to come, are of value. Some of the resolutions adopted by the last conference do not seem to amount to very much by themselves, but each one marks on some line of progress the farthest point to which the world is yet willing to go. They are like cable ends buoyed in mid-ocean, to be picked up hereafter by some other steamer, spliced, and continued to shore. The greater the reform proposed, the longer must be the process required to bring many nations differing widely in their laws, customs, traditions, interests, prejudices, into agreement. Each necessary step in the process is as useful as the final act which crowns the work and is received with public celebration.<sup>1</sup>

The very existence of the Conference is a demonstration of the oneness of mankind, of the superiority of general to special interests and local policy, and the successes of the conferences show the possibility of harmonious coöperation among nationalities differing in race, institutions, languages and traditions. The First Conference showed that twenty-six nations could work harmoniously for the common good; the Second Conference that forty-four States could labor by means of their representatives in peace and harmony for a period of four months and produce conventions and declarations, resolutions and *vœux*, which have been ratified by national legislatures and commend themselves to enlightened public opinion.

The usefulness of conferences for the settlement of inter-

<sup>1</sup>Prefatory note to Texts of the Peace Conferences at the Hague, published by Ginn & Company (1908).



national affairs was proclaimed by theorists and writers of authority, and has been demonstrated by the practice of nations since the Treaty of Westphalia of 1648. The expression in favor of the international congress is contemporaneous with the birth of international law; for in a much admired and frequently quoted passage of the immortal *Three Books on the Law of War and Peace*, Grotius says that

it would be useful, and indeed it is almost necessary, that congresses of Christian Powers should be held, in which the controversies which arise among them may be decided by others who are not interested, and in which measures may be taken to compel the parties to accept Peace on equitable terms.<sup>1</sup>

The context shows that Grotius had in mind the settlement of controversies by arbitration and the conclusion of peace by international congresses. He did not have in mind a union or federation of the States, although, by imposing peace upon disputants by disinterested parties, he recognized the family of nations and its interests as superior to any member and its special interests. The use of force to compel members to accept the decision of disinterested powers presupposes a recognition of the solidarity of nations.

Grotius published his treatise in 1625, and the numerous conferences which have been held in the two centuries and a half preceding the First Hague Conference are in no small degree due to his influence.<sup>2</sup> In placing the wreath upon the tomb of Grotius at Delft on the Fourth of July, 1899, Dr. Andrew D. White, on behalf of the American Delegation, said:

My Honored Colleagues of the Peace Conference, the germ of this work in which we are all so earnestly engaged, lies in a single sentence of Grotius's great book. Others indeed had

<sup>1</sup> *De Jure Belli ac Pacis*, Liber, ii, cap. xxiii, § viii-4.

<sup>2</sup> More than ever it is clear to me that of all books ever written—not claiming divine inspiration—the great work of Grotius on War and Peace has been of most benefit to mankind. Our work here, at the end of the nineteenth century, is the direct result of his, at the beginning of the seventeenth.—Dr. White's *Autobiography*, Vol. II, p. 274.

In a later passage, Dr. White speaks of Grotius as "the man who set in motion the ideas which, nearly three hundred years later, have led to the assembling of this Conference.—*Ibid.*, p. 291.

proposed plans for the peaceful settlement of differences between nations, and the world remembers them with honor: to all of them, from Henry IV and Kant and St. Pierre and Penn and Bentham, down to the humblest writer in favor of peace, we may well feel grateful; but the germ of arbitration was planted in modern thought when Grotius, urging arbitration and mediation as preventing war, wrote these solemn words in the *De Jure Belli ac Pacis*: "maxime autem christiani reges et civitates tenentur hanc inire viam ad arma vitanda."<sup>1</sup>

It is suggested that Grotius may have seen a little book, written by Eméric Crucé and published in 1623, entitled *Le Nouveau Cynée*, in which the proposal was made for a union of the nations and the establishment at Venice of an assembly in which all international controversies should be decided.<sup>2</sup> This remarkable treatise dropped out of sight and, although known to our Charles Sumner,<sup>3</sup> it has but recently been brought to the attention of students by the distinguished Belgian publicist, Ernest Nys. The work deserves well of the friends of peace and arbitration, and it is to be hoped that it may be reprinted and translated into English.

But to revert to Grotius. If known to him, there is no trace of its influence, because Grotius does not speak of a union of the nations, whereas Crucé proposes a universal union and stated in detail the means by which it might be effected.

Two famous projects based upon federation of the nations are known respectively as the Great Design of Henry IV, and the Perpetual Peace of the Abbé de Saint-Pierre.

The plan of Henry IV, or of his minister, Sully, for it is from the latter that we derive our knowledge of the project, contemplated the formation of a "very Christian republic" to consist of fifteen sovereignties, each one of which was to send delegates to a general council, empowered to decide all disputes which might arise between the members of the

<sup>1</sup> Holls' Peace Conference, Appendix III, pp. 549-550.

<sup>2</sup> See, Nys: *Études de droit international et de droit politique* (1890), pp. 308-317; Balch's *Eméric Crucé* (1900), pp. 1-63; Darby's *International Tribunals* (4th ed., 1904), pp. 22-33.

<sup>3</sup> The War System of the Commonwealth of Nations, Mead's ed. of Sumner's *Addresses on War* (1904), p. 196, n. 2. Sumner's copy is now in the Harvard College Library.

republic, and to fix the contribution which each member should make towards the maintenance of the army and navy of the confederation.<sup>1</sup>

This project, which has profoundly influenced modern thought, was a dream of war conquest as well as peace, because its realization presupposed war with Austria. In a letter to Henry, referring to the project, Sully says that it would be necessary

first to reduce the whole House of Austria to a dominion so well adjusted and composed in such due proportion that it would deliver all the Christian States and dominions from the fears and apprehension that it has always given them cause to cherish, of being oppressed and enclosed by it; and, secondly, that all those belonging to that House should be induced by adequate reasons to forsake their former extortionate covetousness, so that they may no longer plan injuries to any one—a state of mind to which it seems impossible to bring them so long as they possess a number of States and kingdoms beyond those included in their Spanish dominions.<sup>2</sup>

The good Abbé de Saint-Pierre, invoking the authority of Henry IV for his Project of Perpetual Peace (published in 1713, 1729), sought to perpetuate the settlement effected by the Treaty of Utrecht and to adjust controversies between nations by pacific means.

For this purpose, to quote the summary of our own Wheaton, the first article of the projet proposed to establish a perpetual alliance between the members of the European League, or Christian republic, for their mutual security against both foreign and civil war, and for the mutual guarantee of their respective possessions and of the treaties of peace concluded at Utrecht.

The second article proposed that each ally should contribute to the common expenses of the grand alliance a monthly contribution to be regulated by the general assembly of their plenipotentiaries.

The third article provided that the allies should renounce the right of making war against each other, and accept the mediation and arbitration of the general assembly of the league for

<sup>1</sup>For details of the Great Design, see Darby's *International Tribunals*, pp. 16–21.

<sup>2</sup>Darby's *International Tribunals*, pp. 20–21.

the termination of their mutual differences, three-fourths of the votes being necessary for a definitive judgment.

The principal sovereigns and States who were to compose the league were arranged in the following order:

1. The King of France.
2. The Emperor of Germany.
3. The King of Spain.
4. The Emperor or Empress of Russia.
5. The King of Great Britain, Elector of Hanover.
6. The Republic of Holland.
7. The King of Denmark.
8. The King of Sweden.
9. The King of Poland, Elector of Saxony.
10. The King of Portugal.
11. The Sovereign of Rome.
12. The King of Prussia, Elector of Brandenburg.
13. The Elector of Bavaria and his co-states.
14. The Elector of Palatine and his co-states.
15. The Swiss and their co-states.
16. The Ecclesiastical Electors and their co-states.
17. The Republic of Venice and its co-states.
18. The King of Naples.
19. The King of Sardinia.

Each of these nineteen Powers was to have a single vote in the European diet, and the smaller republics and princes to be associated in the league, with the right of giving a single collective vote as in assembly of the present Germanic confederation. "Comme le Grand Duc de Toscane peut faire présentement une voix de plus, il sera facile de le nommer comme la vingtième puissance, mais toutes ces petites difficultés peuvent facilement se régler par provision à la pluralité voix."<sup>1</sup>

The fourth article stipulated that if any one of the allied powers should refuse to carry into effect the judgments and regulations of the grand alliance, or negotiate treaties in contravention thereof, or prepare to wage war, the alliance should arm and act offensively against the offending Power until it was reduced to obedience.

The fifth article declared that the general assembly of plenipotentiaries of the alliance should have power to enact by a plurality of votes, all laws necessary and proper to carry into effect the objects of the alliance; but no alteration in the fundamental articles to be made without the unanimous consent of the allies.

The almost verbal coincidence of these articles with those of the fundamental act of the Germanic confederation estab-

<sup>1</sup>Abrég. du Projet de Paix perpétuelle, tom. i. p. 349, edit. de Rotterdam, 1738.



lished by the Congress of Vienna in 1815 is remarkable. Fleury, to whom Saint-Pierre communicated his plan, replied to him: "Vous avez oublié un article essentiel, celui d'envoyer des missionnaires pour toucher les coeurs des princes et leur persuader d'entrer dans vos vues." But Dubois bestowed upon him the highest praise, expressed in the most felicitous manner when he termed his ideas: "les rêves d'un homme de bien."

The Great Design of Henry IV and Saint-Pierre's Perpetual Peace sanctioned the use of force: the first to bring about the confederation; the second to maintain it. The Quaker Penn was also not averse to the use of force to keep the peace; but, as is to be expected, his European Diet, Parliament, or Estates was to be an instrument for the settlement of international disputes by the rules of justice. It was wholly nonpolitical as he neither sought the humiliation of Austria or of France nor the aggrandizement of England.

For the love of Peace and Order, the sovereign princes of Europe were "to agree to meet" by their stated deputies, in a General Diet, Estate, or Parliament, and there establish rules of justice for Sovereign Princes to observe one to another. The Diet was to meet yearly, or "once in two or three years at farthest, as they shall see cause;" representation was to be proportionate and the number of persons or votes was to be reached "by considering the revenues of lands, the exports and entries at the Custom Houses, the book or rates, and surveys that are in all governments: to proportion taxes for their support."

The Assembly was to be a judicial body, and before it should be brought all differences depending between one Sovereign and another, that cannot be made up by private Embassies before the Sessions begin.

In case of refusal to obey the judgment of the Diet, all the other Sovereignities, United as One Strength, shall compel the Submission and Performance of the Sentence, with Damages to the Suffering Party, and Charges to the Sovereignities that obliged their Submission.<sup>1</sup>

<sup>1</sup> Wheaton's History of the Modern Law of Nations, pp. 262-264. For Rousseau's interesting *Projet de Paix Perpetuelle* based upon Saint-Pierre's, see Darby's *International Tribunals*, pp. 104-121; Wheaton's History of the Modern Law of Nations, pp. 264-268.

At the close of the eighteenth century two great thinkers, the one a jurist (Bentham), the other a philosopher (Kant), devoted themselves seriously to devise means whereby the scourge of war might be avoided.

In a plan for an Universal and Perpetual Peace, written in 1789, but not published until 1841, Bentham stated his purpose in a single paragraph:

The following plan has for its basis two fundamental propositions: (1) The reduction and fixation of the force of the several nations that compose the European System; (2) The emancipation of the distant dependencies of each State. Each of these propositions has its distinct advantages; but neither of them, it will appear, would completely answer the purpose without the other.<sup>2</sup>

Bentham did not propose a union or league of States but an agreement to send two deputies to a congress or diet which should sit as a court of justice for the judicial settlement of international disputes.

The proceedings of such congress or diet should be all public.

Its power would consist, 1. In reporting its opinion.

2. In causing the opinion to be circulated in the dominions of each State.

He felt that public opinion would enforce obedience. In case of non-compliance, the refractory State might be put under the ban of Europe. There might, perhaps, be no harm in regulating as a last resource, the contingent to be furnished by the several States for enforcing the decrees of the court."

The use of force would be in all human probability unnecessary, if in the instrument constituting the court, the freedom of the press were guaranteed, so that the decrees of the court might be given the most extensive and unlimited circulation.

While the essence of Bentham's project consists in the establishment of an International Court, Kant proposed a

<sup>1</sup> Penn's *Essay Towards the Present and Future Peace of Europe* (1693-1694), published by the American Peace Society (Boston, 1897).

<sup>2</sup> Bentham's *Works*, edited by Bowring, Vol. II, p. 546. For an admirable summary and exposition of Bentham's plan, see Wheaton's *History of the Modern Law of Nations*, pp. 328-344.

Confederation of States in order to create and maintain peace and only incidentally mentions the judicial settlement of controversies.

Wheaton thus analyzes and summarizes Kant's Perpetual peace:

One of the most remarkable of these projects of perpetual peace was that published by Kant in 1795, soon after the conclusion of the treaty of peace at Basle by which Prussia retired from the continental coalition against the French republic, and guaranteed the neutrality of the other States of northern Germany. The scheme proposed by the philosopher of Koenigsberg was grounded on the same idea of a general confederation of European nations which had been successively conceived by Saint Pierre, Rousseau and Bentham.

Kant develops this idea by laying down as the first condition of perpetual peace that the constitution of every State adhering to the proposed league should be republican, which he defines to be that form of government where every citizen participates by his representatives in the exercise of the legislative power, and especially in that of deciding on the questions of peace and war. A declaration of war decreed in this manner by the nation is in effect decreeing against itself all the calamities and burdens of war. On the other hand, under a constitution of government where the subjects are not citizens, that is under a constitution which is not republican, a declaration of war may be rashly pronounced on insufficient grounds, because it costs nothing to the national chief, who is the master, and not a member of the State—not even the sacrifice of his smallest pleasures. But, according to Kant, a republican form must not be confounded with a democratic form of government. By a republican constitution, he understands any form of government limited by a popular representation, the legislative power being separated from the executive, and the authority to declare war being included in the former. According to his view, democracy excludes representation. It is inevitably despotic, the will of a majority of the sovereigns of which it is composed being unlimited; whilst aristocracy, or even autocracy, although defective inasmuch as they are liable to become despotic by substituting the single will of the chief or chiefs of the State to the general will, still admit the possibility of a representative administration, as Frederick the Great intimated when he said he was "the first servant of the state." Not one of the pretended republics of antiquity possessed, or even had a knowledge of the representative system. They accordingly terminated in the least insupportable form of despotism, that of a single individual.

The second condition of a perpetual peace, according to Kant, is that the public law of Europe should be founded upon a confederation of free States. In the existing system of international relations, the state of nature, which has ceased as between individuals, whilst it still subsists as between nations, is not a state of peace, but of war, if not flagrant, at least always ready to break out. The code expounded by public jurists to nations has never had the obligatory force of law, properly so called, for want of an adequate coercive sanction. The field of battle is the only tribunal where States plead for their rights; but victory, which ends the litigation, does not finally decide the controversy. The treaty of peace which may follow is, in effect, a mere suspension of arms, the contending parties still remaining in a state of hostility towards each other, without being subject to the reproach of injustice, since each party is the exclusive judge in its own cause. The state of peace, must, consequently, ever remain insecure, unless guaranteed by a special compact having for its object the perpetual abolition of war. Nations must renounce as individuals have renounced, the anarchical freedom of savages, and submit themselves to coercive laws, thus forming a Community of Nations, *civitas gentium*, which may ultimately be extended so as to include all the people of the earth. "It may be demonstrated," says our author, "that the idea of a confederation which shall gradually extend to all States, and thus lead them insensibly to universal and perpetual peace, is not an impracticable or visionary idea. It may be realized, if happily a single nation, equally powerful and enlightened, could once constitute itself as a republic, a form of government naturally inclined to perpetual peace. A common center would thus be created for this federative association, around which other States would cluster in order to secure their liberties according to the principles of public law, and this alliance would finally become universal."

He concludes that "if it be a duty to cherish the hope that the universal dominion of public law may ultimately be realized, by a gradual but continued progress, the establishment of perpetual peace to take the place of those mere suspensions of hostility called treaties of peace, is not a mere chimera, but a problem, of which time, abridged by the uniform and continual progress of the human mind, will ultimately furnish a satisfactory solution."<sup>1</sup>

In his metaphysics of jurisprudence published in 1797, treating of the science of international law in general, Kant insists

<sup>1</sup> *Projet de paix perpetuelle, essai philosophique par Emanuel Kant. Traduit de l'allemand avec un Nouveau Supplément de l'auteur, Koenigsberg, 1796.*



upon the same views as to the practicability of a perpetual peace. In this work he observes, "that the natural state of nations, being like that of individuals, a State which must be abandoned in order to enter into a social state sanctioned by law, every right acquired by war previous to this transition must be considered as provisional merely, until confirmed by a general union of independent States, analogous to that association of individuals which forms each separate State. The establishment of perpetual peace, which ought to be considered as the ultimate object of every system of public law, may perhaps be considered as impracticable, inasmuch as the too great extension of such a federal union might render impossible that supervision over its several members and that protection to each member which is essential to its ends. But the establishment of those principles which tend to further this object, by forming such alliances between different States as may gradually lead to its accomplishment, is by no means an impracticable idea, since it is grounded upon the rights and the duties of men and of States.

"Such a general association of States, having for its object the preservation of peace, might be termed the Permanent Congress of Nations. Such was the diplomatic conference formed at The Hague during the first part of the eighteenth century, with a similar view consisting of the ministers of the greater part of the European courts and even of the smallest republics. In this manner all Europe was constituted into one federal state, of which the several members submitted their differences to the decision of this conference as their sovereign arbiter. Since that epoch the law of nations may be said to have remained in the books of the public jurists a dead letter without practical influence on the actual conduct of governments, or else has been invoked when too late to correct the irreparable evils inflicted by the abuse of force.

"What we mean to propose is a General Congress of Nations of which both the meeting and the duration are to depend entirely on the sovereign wills of the several members of the league, and not an indissoluble union like that which exists between the several States of North America founded on a municipal constitution. Such a congress and such a league are the only means of realizing the idea of a true public law, according to which the differences between nations would be determined by civil proceedings as those between individuals are determined by civil judicature, instead of resorting to war, means of redress worthy of barbarians."<sup>1</sup>

<sup>1</sup> Wheaton's *History of the Modern Law of Nations*, pp. 750-754. For the full text, see Hastie's translation of Kant's *Principles of Politics*, pp. 77-148; Dr. Trueblood's translation published by the American Peace Society (Boston, 1897).

The various plans of Henry IV, Eméric Crucé, Saint-Pierre and Rousseau's project based upon it, the Diet of William Penn, and the Essays of Bentham and Kant may be called the classic projects for the establishment of an International Congress as a means of maintaining peace among the nations.

It will be noted that the English plans are judicial, as becomes the Anglo-Saxon, who has made the judicial settlement of international controversies a confession of faith. Penn's plan is for a reunion of a diet or parliament of negotiators; Bentham's plan is for a court composed of two members from each party to its establishment. The European plans are political: Henry's is based upon the humiliation of Austria; Saint-Pierre assumes the primacy of France. Kant's is political in the sense that it presupposes a change in the internal organization of nations whereby their governments become republican, that is, constitutional and representative. The acceptance of Kant's plan would, however, be in the common interest and would not inure to the advantage of any nation.

The projects of the nineteenth century are not only of importance in themselves, but show that the desire for a closer and intimate relation of the nations is not a dream of the past, nor an idle speculation of the present, but a hope for the future.

Of the many plans, three are of especial significance, and show how the national institutions influence each author who seeks to create international institutions. William Ladd's Congress of Nations, published in 1840, suggesting a Diplomatic Congress for the codification of International law, and a separate and distinct Court of Nations for its administration, bears unmistakable evidence of American authorship.<sup>1</sup>

James Lorimer's scheme for the organization of an International Government with its seat at Geneva betrays the Briton,<sup>2</sup> and Bluntschli's Organization of a European Federa-

<sup>1</sup> Darby's *International Tribunals*, pp. 409-413.

<sup>2</sup> Lorimer's *Institutes of the Law of Nations*, Vol. II, pp. 240-278; 279-287.

tion (1878)<sup>1</sup> is based upon the experience of Germany with special reference to the federation of Germany into an Empire.

That The Hague Conferences have brought nations together as never before is patent to the casual observer; that the periodic meeting of the Conference will bring them into still closer relations is equally evident; but it is a matter of doubt and of no little difficulty to predict whether the International Conference will remain a diplomatic assembly, or will result in a federation of Independent, Sovereign and Equal States.

It may be that federation is a dream. Our own experience in the Constitutional Convention of 1787 shows with what difficulty States of a common origin, with common history, institutions and traditions, speaking the same language, can be persuaded, even for a common purpose, to lay aside their individual sovereignty and unite in a definite and permanent union for the common good. The difficulty would be immeasurably greater to unite independent and sovereign nations into a federation, however loose, when their traditions and institutions are at variance, when their languages and literatures are instinct with nationality, their ambitions so divergent and irreconcilable, and when the sacrifice is so evident and the benefits so problematical or undemonstrated.

The form is nothing; the substance is everything, and the uniformity produced by international conference and decision differs so little from the uniformity resulting from a federation as to be negligible. An international conference meeting at regular stated intervals, in which nations large and small meet on a plane of equality to discuss questions of universal importance and to legislate *ad referendum*, offers the advantages of federation without its disadvantages. Public opinion determines the destiny of a nation; international opinion, stronger than any combination of nations, draws the world more closely together than a mere political union. The

<sup>1</sup>Bluntschli's *Gesammelte Kleine Schriften* (1881), Vol. II, pp. 279-312; Darby's *International Tribunals*, pp. 194-213.

federation of the world may come, if public opinion insists that the world be federated; but, as a federation involves the organization of an executive, and as the question of an executive is beset with manifold difficulties, it seems improbable to expect it, even if desirable, within a conceivable future.

It may well be that the preparatory committee mentioned by the recommendation for a Third Conference, "charged by the Governments with the task of collecting the various proposals to be submitted to the Conference, of ascertaining what subjects are ripe for embodiment in an international regulation," will develop into a standing committee entrusted with international interests between the various conferences. Especially would this be so if the committee were appointed by the Conference, instead of being selected by agreement of the Powers sometime before the calling of the future Conference. It would not be an executive; it would not be a Government; it would, however, as a committee, represent international interests during the periods between the Conferences.

If the tentative provision of a preparatory committee for the Third Conference commends itself to enlightened opinion, and if it prove itself worthy of confidence, it may be the germ of an international executive, or the functions of the Permanent Administrative Council, or the International Bureau may be enlarged so as to watch over, if not control, the international relations of the Signatory Powers. It may also be that the Permanent Court may be developed into an international and permanent judiciary. The establishment of the Court of Prize shows that the Powers are not averse to a permanent international tribunal if only its need be demonstrated. It seems, therefore, that the foundations are laid for an international organization. It depends on public opinion to rear the structure.





# APPENDIX



## APPENDIX TO CHAPTER I

### MR. BLAINE TO MR. OSBORN PROPOSING THE FIRST PAN-AMERICAN CONFERENCE

DEPARTMENT OF STATE,  
WASHINGTON, November 29, 1881.

*Sir:* The attitude of the United States with respect to the question of general peace on the American continent is well known through its persistent efforts for years past to avert the evils of warfare, or, these efforts failing, to bring positive conflicts to an end through pacific counsels or the advocacy of impartial arbitration.

This attitude has been consistently maintained, and always with such fairness as to leave no room for imputing to our government any motive except the humane and disinterested one of saving the kindred States of the American continent from the burdens of war. The position of the United States as the leading power of the new world might well give to its government a claim to authoritative utterance for the purpose of quieting discord among its neighbors, with all of whom the most friendly relations exist. Nevertheless, the good offices of this government are not and have not at any time been tendered with a show of dictation or compulsion, but only as exhibiting the solicitous goodwill of a common friend.

For some years past a growing disposition has been manifested by certain States of Central and South America to refer disputes affecting grave questions of international relationship and boundaries to arbitration rather than to the sword. It has been on several such occasions a source of profound satisfaction to the government of the United States to see that this country is in a large measure looked to by all the American powers as their friend and mediator. The just and impartial counsel of the President in such cases has never been withheld,



and his efforts have been rewarded by the prevention of sanguinary strife or angry contentions between peoples whom we regard as brethren.

The existence of this growing tendency convinces the President that the time is ripe for a proposal that shall enlist the goodwill and active coöperation of all the States of the western hemisphere, both north and south, in the interest of humanity and for the common weal of nations. He conceives that none of the Governments of America can be less alive than our own to the dangers and horrors of a state of war, and especially of war between kinsmen. He is sure that none of the chiefs of Governments on the continent can be less sensitive than he is to the sacred duty of making every endeavor to do away with the chances of fratricidal strife. And he looks with hopeful confidence to such active assistance from them as will serve to show the broadness of our common humanity and the strength of the ties which bind us all together as a great and harmonious system of American commonwealths.

Impressed by these views, the President extends to all the independent countries of North and South America an earnest invitation to participate in a general congress to be held in the city of Washington on the twenty-fourth day of November, 1882, for the purpose of considering and discussing the methods of preventing war between the nations of America. He desires that the attention of the congress shall be strictly confined to this one great object; that its sole aim shall be to seek a way of permanently averting the horrors of cruel and bloody combat between countries, oftenest of one blood and speech, or the even worse calamity of internal commotion and civil strife; that it shall regard the burdensome and far-reaching consequences of such struggles, the legacies of exhausted finances, of oppressive debt, of onerous taxation, of ruined cities, of paralyzed industries, of devastated fields, of ruthless conscription, of the slaughter of men, of the grief of the widow and the orphan, of embittered resentments, that long survive those who provoked them and heavily afflict the innocent generations that come after.

The President is especially desirous to have it understood that, in putting forth this invitation, the United States does not assume the position of counseling, or attempting, through the

voice of the congress, to counsel any determinate solution of existing questions which may now divide any of the countries of America. Such questions cannot properly come before the congress. Its mission is higher. It is to provide for the interests of all in the future, not to settle the individual differences of the present. For this reason especially the President has indicated a day for the assembling of the congress so far in the future as to leave good ground for hope that by the time named the present situation on the South Pacific coast will be happily terminated, and that those engaged in the contest may take peaceable part in the discussion and solution of the general question affecting in an equal degree the well-being of all.

It seems also desirable to disclaim in advance any purpose on the part of the United States to prejudge the issues to be presented to the congress. It is far from the intent of this government to appear before the congress as in any sense the protector of its neighbors or the predestined and necessary arbitrator of their disputes. The United States will enter into the deliberations of the congress on the same footing as the other powers represented, and with the loyal determination to approach any proposed solution, not merely in its own interest, or with a view to asserting its own power, but as a single member among many coördinate and coequal States. So far as the influence of this government may be potential, it will be exerted in the direction of conciliating whatever conflicting interests of blood, or government, or historical tradition may necessarily come together in response to a call embracing such vast and diverse elements.

You will present these views to the Minister of Foreign Relations of the Argentine Republic, enlarging, if need be, in such terms as will readily occur to you, upon the great mission which it is within the power of the proposed congress to accomplish in the interest of humanity, and upon the firm purpose of the United States to maintain a position of the most absolute and impartial friendship towards all. You will thereupon, in the name of the President of the United States, tender to His Excellency the President of the Argentine Republic, a formal invitation to send two commissioners to the congress, provided with such powers and instructions on behalf of their Government as will enable them to consider the questions brought

before that body within the limit of submission contemplated by this invitation. The United States, as well as the other Powers, will, in like manner, be represented by two commissioners, so that equality and impartiality will be amply secured in the proceedings of the congress.

In delivering this invitation through the Minister of Foreign Affairs, you will read this dispatch to him and leave with him a copy, intimating that an answer is desired by this government as promptly as the just consideration of so important a proposition will permit.

I am, etc.,

JAMES G. BLAINE.<sup>1</sup>

<sup>1</sup> *Foreign Relations*, 1881, pp. 13-15.

## APPENDIX TO CHAPTER III

### 1. A STATED INTERNATIONAL CONGRESS

TO MEET ONCE EVERY FIVE OR SEVEN YEARS, TO DELIBERATE  
UPON MATTERS OF COMMON INTEREST TO THE NATIONS  
AND MAKE RECOMMENDATIONS TO THE GOVERNMENTS

*To the General Court of Massachusetts:*

The Board of Directors of the American Peace Society, with headquarters in Boston, Massachusetts, respectfully petition your honorable body to adopt a resolution requesting the Congress of the United States to authorize the President of the United States to invite the Governments of the world to join in establishing, in whatever way they may judge expedient, a regular international congress, to meet at stated periods—say, every seven years—to deliberate upon the various questions of common interest to the nations and to make recommendations thereon to the Governments.

The following reasons lead us to believe that the time is ripe for such action:

1. The nations are today united, as never before, in commercial, economic, scientific, social and philanthropic relations, and their mutual interests are constantly and rapidly increasing.

2. The questions constantly arising which concern them all so intimately, require their united action for proper solution, as the Governments themselves have long practically recognized.

3. Within the past century about thirty important international congresses and conferences have been held for the discussion and adjustment of matters of immediate and pressing importance—an average of one about every three and a half years. These congresses, a list of the more important of which is given below, have been in large measure successful, and, besides accomplishing the ends for which they were called, have done much to remove friction and prejudice and to promote



harmony between the nations, and thereby the general interests of all.

4. These congresses have not only increased in frequency in recent years, and in the number of nations represented in them, but they have also tended to become more and more legislative or quasi-legislative, as in the case of the recent Pan-American Conference, the Brussels Sugar Congress and the Hague Peace Conference.

5. The organization of an international congress of the kind here suggested, to meet at stated periods, would therefore not be an altogether new experiment, but would continue in a regular, permanent and more complete form, with the increased efficiency and usefulness which permanence and regularity bring, what has already been successfully tried on numerous occasions.

6. The idea of a world-congress, on which your honorable predecessors in the General Court of Massachusetts passed strong resolutions in 1837 and 1838, has made great progress in recent years. At The Hague Peace Conference and the Pan-American Conference at Mexico City there was a strong feeling, often expressed, on the part of many of the leading delegates, that such conferences ought to be continued at regular intervals. Not a few publicists of the day feel that the time is near when, in the larger interests of humanity as a whole, a world-congress with real legislative powers will have to be created.

7. There is reason to believe that the proposition to organize a regular congress for deliberation and recommendation on matters of general international concern would not meet with serious objection in any quarter among the nations. The creation of such a congress, whose recommendations would require ratification by the nations before becoming public law, would not impose upon the Governments the sacrifice of any of their sovereignty and self-direction. The work of such an international body would in a few decades enable the nations to determine clearly whether it would be expedient for them to go further and to develop the organization into a world-congress with legislative powers.

8. The Permanent International Court for the settlement of controversies between nations has been set up by the leading Powers of the world and is now in successful operation. The

counterpart and complement of this court, to which the reference of disputes is voluntary, would be a congress with deliberative and advisory powers, which would perform an equally important service in the development and formulation of international law as the court will do in its interpretation and application.

9. The meeting of regular international congresses for the consideration of the various common interests of the nations would exert a great and growing influence in favor of amity and mutual goodwill, would lessen the dangers of war, and assure the permanence of peace and the continuance of prosperous commercial relations.

#### A. INTERNATIONAL CONGRESSES AND CONFERENCES

- 1815. The Congress of Vienna, which adjusted the questions left by the Napoleonic campaigns.
- 1825. The Conference of St. Petersburg, which prepared the way for the independence of Greece.
- 1831. The Conference of London, which made Holland and Belgium independent nations.
- 1856. The Congress of Paris, which disposed of the questions entailed by the Crimean War.
- 1864. The Geneva Congress, which established the International Red Cross Society.
- 1867. The Conference of London, which neutralized the Grand Duchy of Luxemburg.
- 1868. The Congress of St. Petersburg, which provided for the restriction of the use of certain types of bullets.
- 1871. The Conference of London, which modified the Paris Treaty of 1856.
- 1874. The Congress of Brussels, which prepared a restatement and improvement of the laws of war.
- 1874. The first International Postal Congress, held at Berne, which organized the Universal Postal Union.
- 1875. The Metrical Diplomatic Congress at Paris, which prepared the International Metric Convention and provided for the meeting of a general Conference on Weights and Measures at Paris at least once every six years.

- 1875. The International Telegraphic Conference at St. Petersburg.
- 1877. The Conference of Constantinople, in the interests of the rights of the Porte's Christian subjects.
- 1878. The Congress of Berlin, which modified the treaty of San Stefano after the Russo-Turkish War and rearranged the map of Eastern Europe.
- 1878. International Monetary Conference at Paris, invited by the United States.
- 1881. International Monetary Conference at Paris, invited by the United States and France.
- 1884. The Berlin West African Congress, which set up the Congo Free State.
- 1885. International Prime Meridian Conference at Washington, invited by the United States and attended by representatives from twenty-six nations.
- 1889. The Marine Conference of Washington.
- 1889. The first Pan-American Conference at Washington.
- 1890. The Brussels Anti-Slavery Conference.
- 1892. International Sanitary Conference at Venice, the protocol drawn by which was signed by the delegates of fifteen nations.
- 1893. International Sanitary Conference at Dresden, in which nineteen nations were represented.
- 1896. The Universal Postal Congress, held at Washington and attended by representatives from every nation on the globe.
- 1899. The Hague Peace Conference, which provided for the organization of the Permanent International Court of Arbitration.
- 1901. The Brussels Sugar Congress, which provided for the abolition of sugar bounties.
- 1901. The Second Pan-American Conference, held at Mexico City.

By order of the Board of Directors,

ROBERT TREAT PAINE, *President.*

BENJAMIN F. TRUEBLOOD, *Secretary.*

*Boston, January 1, 1903.*

## 2. THE ADMISSION OF LATIN-AMERICA TO THE SECOND CONFERENCE

### A ACTION OF SECOND PAN-AMERICAN CONFERENCE

On January 15, 1902, the Second Pan-American Conference, in session at Mexico, recognized the three conventions signed at The Hague on July 29, 1899, as a part of public international American law, and at the same time requested the United States and Mexico to secure the admission of the non-signatory American States to the benefits of the convention for the peaceful settlement of international disputes. The exact text of the project follows:

#### ARTICLE 1

The American Republics represented at the International Conference of American States in Mexico, which have not subscribed to the three Conventions signed at The Hague on the 29th of July, 1899 hereby recognize as a part of Public International American Law the principles set forth therein.

#### ARTICLE 2

With respect to the Conventions which are of an open character the adherence thereto will be communicated to the Government of Holland through diplomatic channels by the respective Governments, upon the ratification thereof.

#### ARTICLE 3

The wide general convenience being so clearly apparent that would be secured by confiding the solution of differences to be submitted to arbitration to the jurisdiction of a tribunal of so high a character as that of the Arbitration Court at The Hague, and, also, that the American nations, not now signatory to the Convention creating that beneficent institution, can become adherents thereto by virtue of an accepted and recognized right; and, further, taking into consideration the offer of the Government of the United States of America and the United States of Mexico, the Conference hereby confers upon said governments the authority to negotiate with the other Signatory Powers to the Convention, for the Peaceful Adjustment of International Differences for the adherence thereto of the American Nations so requesting and not now signatory to the said Convention.<sup>1</sup>

<sup>1</sup> International American Conference, Vol. II, pp. 336-337.



B. EXTRACT FROM MR. ROOT'S LETTER OF MARCH 22, 1906, TO PROGRAM COMMITTEE OF THE THIRD PAN-AMERICAN CONFERENCE

You will recall that the Conference in Mexico adopted a protocol of adherence to the conventions of The Hague, and, in the third article of that protocol conferred upon the Governments of the United States of America and the United States of Mexico authority to negotiate with the other signatory Powers to the Convention for the peaceful adjustment of international differences, for the adherence thereto of the American nations so requesting and not then signatory to the said Convention.

At different times since the Mexican Conference the United States has endeavored to secure the admission of individual States of Central and South America as additional signatories to The Hague Convention, but without avail, for the reason that no express provision was made therefor in The Hague Convention.

In October, 1904, Mr. Hay, in taking the initiative on behalf of the United States for the calling of a second Conference at The Hague, made one of the subjects of his letter to all the Signatory Powers, a suggestion for the consideration and adoption of a procedure by which States non-signatory to the original acts of The Hague Conference might become adhering parties. This was further pressed upon the Powers by a note communicated to all of them in December, 1904. Accordingly when, in October, 1905, upon the close of the war between Japan and Russia, the President of the United States yielded to Russia the initiative in bringing a Second Hague Conference, Russia included all the South American States in the call for the Conference, and nearly all of them have accepted the invitation.

It is evident that by thus pressing for inclusion of all the American States in the general agreement of the nations at The Hague, we have all of us assumed a responsibility which we must be prepared to discharge when the next Conference is convened. It appears to me that it is very desirable that the way in which that responsibility shall be discharged should be made the subject of consultation and discussion at the Rio Conference, so that the delegates of the American States may attend The Hague Conference with well considered and matured instructions.<sup>1</sup>

C. EXTRACT FROM MR. ROOT'S INSTRUCTIONS TO AMERICAN DELEGATION TO THE THIRD PAN-AMERICAN CONFERENCE, JUNE 18, 1906.

The Second American Conference at Mexico adopted a resolution January 15, 1902, authorizing the Governments of the United States and Mexico to negotiate with the other Signatory Powers for the adherence of the American States to the general arbitration convention, and the United States subsequently applied in behalf of several of the other American States for their admission to become signatories to the convention. The Signatory Powers, however, never came together in an agreement upon the contemplated conditions of adherence, and the requests preferred by the United States were refused.

<sup>1</sup> Quoted from Luís<sup>1</sup> M. Drago's *Cobro Coercitivo de Deudas Públicas*, pp. 153-156 (1906).

On the 21st of October, 1904, the United States issued a proposal to the Signatory Powers of the First Hague Conference for a second conference and specified as one of the things to be done the adoption of a procedure by which States nonsignatory to the original acts might become adhering parties. This proposal met with general acceptance, but the calling of the Conference was postponed, owing to the war between Russia and Japan. On the 13th of September, 1905, the further initiative in calling the Conference was taken by the Emperor of Russia, with the ready concurrence of the President, and the Emperor of Russia included in his invitation to the Second Conference all the American States.

As a part of the preliminary arrangements for the Second Hague Conference, it has been agreed that in order that all the States represented at the Second Conference may be upon the same footing in discussing modifications or extensions of the treaty of arbitration, the first business of the Second Conference shall be to authorize, by a preliminary protocol, the adherence of all the nonsignatory States to the arbitration treaty of the First Conference. This understanding has been communicated by Russia to all the Signatory States, and their assent to it is regarded as making the proposed action certain and leaving nothing further to be done but the formal action to be taken at the opening of the Second Hague Conference.

All of the American States are accordingly at liberty to become parties to the general arbitration treaty of The Hague and to take part in the consideration by the whole civilized world of the advances which may be made in the application of the principle of arbitration.

The Conference at Rio can probably render no more useful service to the cause of arbitration than by securing the general assent of the American States to the principles which should receive a new impetus and universal effect at The Hague.<sup>1</sup>

#### D. THE QUESTION OF ADHERENCE OF NONSIGNATORY STATES TO THE FIRST CONVENTION OF 1899 UNDER ARTICLE 60 TO ENABLE THEM TO PARTICIPATE IN THE SECOND CONFERENCE

##### (a) THE ACTING SECRETARY OF STATE TO THE BRAZILIAN AMBASSADOR

DEPARTMENT OF STATE,  
WASHINGTON, March 5, 1907.

*My dear Mr. Ambassador:* This Government recently instructed its Ambassador at St. Petersburg to ascertain from the Russian Government what answer had been received from the Signatory Powers of the first arbitration treaty of the First Peace Conference to the proposal that the adherence of the nonsignatory American States should be accepted, so as to enable

<sup>1</sup> Report of the Delegates of the United States to the Third International Conference of the American States, pp. 40-41 (1907).

them all to participate in the Second Conference. I am today advised by Ambassador Riddle by cable that he is informed by the Russian Minister for Foreign Affairs that assents have been received by Russia from all the signatories except Belgium, China, and Turkey, which have not yet replied.<sup>1</sup>

For greater convenience in appreciating the true force of this information, let me restate the various steps which have been taken upon this subject.

1. In a note dated April 12, 1906, the Russian Government remarked that several of the States invited to participate in the Second Conference had not taken part in the First Conference, and that a difficulty of form only stood in the way of their admission to the Second Conference, that difficulty consisting of the fact that they had not adhered to the arbitration treaty signed at the First Conference and could not adhere without an agreement between the Signatory Powers.

That difficulty Russia proposed to dispose of by the suggestion that on the opening of the Second Conference the representatives of the States, parties to the First Conference, should sign the following protocol:

The representatives at the Second Peace Conference of the States Signatories of the Convention of 1899 relative to the peaceful settlement of international disputes, duly authorized to that effect, have agreed that in case the States that were not represented at the First Peace Conference, but have been convoked to the present Conference, should notify the Government of the Netherlands of their adhesion to the above-mentioned convention they shall be forthwith considered as having acceded thereto.

The assent of the Signatory Powers to this proposal was asked by Russia.

2. The United States promptly gave its assent to the course in a reply which said:

It is the understanding of the United States that should the other Powers who took part in that Conference (the First Conference) assent to the proposal of your note of April 12, that assent in itself will have the effect of making it certain that the adhesion of the Powers which did not take part in the First Conference will be accepted, so that their representatives can go to the Second Conference without feeling that there is any uncertainty as to whether they can take full part in the Conference.

<sup>1</sup> Belgium signified its assent March 29, 1907 (telegram that date from Minister Wilson to Department of State). China assented March 28, 1907 (telegram dated March 29 from Minister Rockhill to Department of State). Turkey consented April 13, 1907 (telegram dated April 14, 1907 from Ambassador Leishman to Department of State).—Ms. Records, Department of State.

3. To this note the Russian Government replied as follows:

The desire that the newly invited Powers be permitted from the outset to participate in the Conference is the basis of our project for the settlement of the question of their adhering to the First Convention of 1899. If all the Signatory Powers accept this procedure, the Conference will not have to pass upon the question of adhesion. To our mind, the Conference will have but to take formal notice of that fact at its first session, in which all the Powers that have adhered to the second and third conventions and declared their desire to adhere to the first shall be permitted to take part.

The fact that the necessary assent to this procedure has been received from all the Powers except Belgium, China, and Turkey, which have not yet replied, seems to leave no doubt that the Russian proposal will be accepted by all the Powers and to justify preparations for attendance at the Second Conference upon this assumption.

I have communicated this information under the impression that it may contribute to your convenience, in view of the fact that the time before the meeting of the Conference is growing short and that the Russian Government may not deem it proper to communicate with you until all the answers have been received.

I am, etc.,

ROBERT BACON,  
*Acting Secretary.*

The above note also sent to:

Minister to Uruguay.  
Minister to Dominican Republic.  
Minister to Panama.  
Minister to Nicaragua.  
Minister to Peru.  
Chargé d'Affaires *ad interim* of Guatemala.  
Chargé d'Affaires *ad interim* of Honduras.  
Minister of Costa Rica.  
Minister of Colombia.  
Minister of Bolivia.  
Minister of Argentine Republic.  
Minister of Haiti.  
Chargé d'Affaires *ad interim* of Chile.  
Chargé d'Affaires *ad interim* of Venezuela.  
Minister of Ecuador.

(b) As the result of prolonged negotiations, the Secretary of



State was able to inform our Minister to the Netherlands on April 17, 1907, that

The Russian Government, in its note of April 12, 1906, has set out a copy of a proposed agreement under this provision and all the contracting Powers have now assented to it. It provides that in case the States not represented at the First Conference shall notify the government of the Netherlands of their adhesion to the above-mentioned convention, they shall be forthwith considered as having acceded thereto.

It is plainly unnecessary for the South American Powers to enter into any new treaty with the Netherlands or with anyone else, except by a mere notice of adhesion. That notice must of course come either from the Minister for Foreign Affairs direct or from some representative who has power to give the notice.

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(c) MINISTER HILL TO THE SECRETARY OF STATE

[No. 218]

AMERICAN LEGATION,

THE HAGUE, April 18, 1907.

*Sir:* I have the honor to acknowledge the receipt of your telegram of April 17 . . . .

And to confirm my telegraphic reply . . . .

By way of comment I have to add that the Netherlands Minister for Foreign Affairs has had no thought of the necessity of the South American or other nonsignatories of The Hague Convention entering into any new treaty with the Netherlands or with anyone else except by a mere notice of adhesion to The Hague Convention. He agrees with the view expressed in your telegram that this notice must come either from the Minister for Foreign Affairs direct or from some representative who has power to give the notice, as explained in the next to the last paragraph of my No. 206. He only insists that notification must be given of adhesion before the Conference meets, and his expectation was that any Government not having already given formal written notice of adhesion would provide its delegates, or its plenipotentiary here, with full powers to notify adhesion. He considers it sufficient that the notification, if in sufficient time, should be sent in any authentic form, but wished to emphasize the necessity of formal notice of adhesion, as provided for in the Russian note of April 12, 1906, as an essential preliminary to participation in the Conference.

In our conversation today, the Minister repeated the point presented in the last paragraph of my No. 206, namely, that he would expect that representatives of the Governments assenting to the Russian proposal of April 12, 1906, in accordance with Article 60 of the arbitration convention, would be authorized to sign a formal protocol setting forth that these Governments give their assent to the adherence of the nonsignatories in the manner proposed. He added that he had notified all the assenting Governments that such a protocol would be prepared, and that he would expect it to be signed in the Treves Zaal on the day before the opening of the Conference by the empowered representatives of the assenting Governments. When this notice is received at Washington this point will, no doubt, be made perfectly clear.

There appears, then, to be no material difference of view between the position taken in your telegram and the understanding of the Netherlands Government, so far as the adhesion of the South American States is concerned. After my full and clear discussion of the whole subject with the Minister for Foreign Affairs, I do not see how any embarrassment can arise for the adhering States, provided (1) they notify the Netherlands Minister for Foreign Affairs of their adhesion, either, as you suggest, directly through their Ministers for Foreign Affairs or through authorized representatives; and (2) provided the representatives of the assenting Signatory Powers are duly authorized to sign the protocol as requested by the Netherlands Government.

Regarding this last, I may say that it appears to be considered by the Minister for Foreign Affairs of the Netherlands as a desirable method of giving unity and finality to the action taken under Article 60 of the convention of arbitration. It is intended to sum up in one formal act the Russian proposal and the assent of the Signatory Powers. Whatever difference of opinion there may be about the necessity of thus solemnizing in one document the action taken by the Powers individually, compliance with the wishes of the Netherlands Government in this respect can occasion no great inconvenience and will put the conclusion reached beyond all question. It is not intended that this protocol shall have the form of a new treaty, but that it shall merely affirm in one document the action taken by the

proposal contained in the Russian note of April 12 and the assent of the Powers separately given in conformity with it. Nor does the action of the States-General of the Netherlands authorizing the extension of the ratification of the existing Hague Convention to new adherents contemplate any new treaties. This action was taken in order to place beyond all question the constitutional legality of admitting the new adherents to these conventions, so far as the Netherlands is concerned, and has significance only from a Netherlands point of view. It is entirely a constitutional, and not an international, measure, designed to meet the requirements of the fundamental law of the country.

There is, therefore, no question of any new treaty connected with the adhesion of the South American or other States to the Convention of 1899. That adhesion may be accomplished by mere notifications by the respective adherents with the assent of the original Signatory Powers. Everything else is a matter of form, which the Netherlands Government, being charged with the execution of the convention of arbitration in this respect, feels called upon to regulate.

I have, etc.,

DAVID J. HILL.

(d) THE NETHERLAND MINISTER TO THE SECRETARY OF STATE

[*Translation.*]

[No. 259]

ROYAL LEGATION OF THE NETHERLANDS,  
WASHINGTON, D. C., May 7, 1907.

*Mr. Secretary of State:* By order of my Government, I have the honor to advise Your Excellency that the Cabinet of St. Petersburg has notified the Government of the Queen that all the Governments which took part in the First Peace Conference have accepted the proposition, addressed to them by the Imperial Government, that they sign, before the opening of the forthcoming Peace Conference, a special protocol concerning the mode of adhesion to the convention for the peaceful settlement of international disputes on the part of the Powers which did not take part in the First Conference but have been invited to the Second Conference.

The protocol, of which the text is appended hereto, shall be signed at The Hague, at 2 p.m. on June 14 next, in the Hall of Truce.

I am instructed by my Government to ask that the American Government will supply its representatives at The Hague with the requisite full powers to sign the protocol on the above-indicated date.

Hereby complying with my orders, I beg that Your Excellency will kindly let me know what reception is to be given to this request, and embrace the opportunity to renew to Your Excellency the assurance of my highest consideration.

VAN SWINDEREN.

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[*Inclosure No. 1.*]

Les Représentants à la deuxième Conférence de la Paix des États signataires de la Convention de 1899 relative du règlement pacifique des conflits internationaux, dûment autorisés à cet effet, sont tombés d'accord que, dans le cas, où les États qui n'avaient pas été représentés à la Première Conférence de la Paix, mais qui ont été convoqués à la Conférence actuelle, notifieraient au Gouvernement Néerlandais leur adhésion à la Convention susmentionnée, ils seraient aussitôt considérés comme y ayant accédé.

TRANSLATION OF PROTOCOL.

[*Inclosure No. 2.*]

The Representatives, at the Second Peace Conference, of the States signatory to the Convention of 1899 relative to the pacific settlement of international disputes, duly authorized to that effect, have agreed that in case the States which were not represented at the first Peace Conference but have been invited to the present Conference should notify the Netherlands Government of their adhesion to the above-mentioned Convention they would forthwith be considered as having acceded thereto.

(e) THE ACTING SECRETARY OF STATE TO THE  
NETHERLAND MINISTER

[No. 134]

DEPARTMENT OF STATE,

WASHINGTON, May 11, 1907.

Sir: I have the honor to acknowledge the receipt of your note of the 7th instant, inclosing, by order of your Govern-



ment, the text of a protocol concerning the adhesion of States not represented at the First Conference to the convention for the pacific settlement of international disputes, and requesting that the American delegates to the Second Peace Conference be supplied with full powers to sign the protocol at The Hague on June 14.

In reply I have the honor to inform you that the President has issued his full power authorizing the American delegates to sign the protocol for and in the name of the United States.

Accept, etc.,

ROBERT BACON,  
*Acting Secretary.*

#### E. PROTOCOL PERMITTING ADHERENCE

The Powers which have ratified the Convention for the peaceful settlement of international disputes, signed at The Hague, on July 29, 1899, desiring to enable the States that were not represented at the First Peace Conference and were invited to the Second to adhere to the aforesaid Convention, the undersigned delegates or diplomatic representatives of the above mentioned Powers, viz:

Germany, Austria-Hungary, Belgium, Bulgaria, China, Denmark, Spain, the United States of America, the United Mexican States, France, Great Britain, Greece, Italy, Japan, Luxembourg, Montenegro, Norway, the Netherlands, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden, Switzerland, and Turkey, duly authorized to that effect, have agreed that there shall be opened by the Minister of Foreign Affairs of the Netherlands, a procès-verbal of adhesion that shall serve to receive and record the said adhesions, which shall immediately go into effect. In witness whereof the present protocol was drawn up, in a single copy, which shall remain in deposit in the archives of the Ministry of Foreign Affairs of the Netherlands and of which an authenticated copy shall be transmitted to each one of the Signatory Powers.

Done at The Hague, June 14, 1907.

Germany:

K. VON SCHLÖZER

Austria-Hungary:

G. DE MÉREY

Belgium:

GUILLAUME

Bulgaria:

GÉNÉRAL-MAJOR  
VINAROFF

## China:

LOU TSENG-TSIANG

## Denmark:

C. BRUN

C. F. SCHELLER

A. VEDEL

## Spain:

JOSÉ DE LA RICA Y CALVO

## United States:

JOSEPH H. CHOATE

HORACE PORTER

U. M. ROSE

DAVID JAYNE HILL

WM. I. BUCHANAN

C. S. SPERRY

GEO. B. DAVIS

## Mexico:

GONZALO A. ESTEVA

S. B. DE MIER

F. L. DE LA BARRA

## France:

LÉON BOURGEOIS

## Great Britain:

HENRY HOWARD

## Greece:

CLÉON KIZO RANGABÉ

GEORGES STREIT

## Italy:

G. TORNIELLI

G. POMPIJ

## Japan:

KEIROKU TSUDZUKI

AIMARO SATO

## Luxembourg:

EIJSCHEM

COUNT DE VILLERS

## Montenegro:

A. NÉLIDOW

MARTENS

N. TCHARYKOW

## Norway:

F. HAGERUP

## Netherlands:

W. D. DE BEAUFORT

## Persia:

MOMTAZOS SALTANEH M.

SAMAD KHAN

SADIGH UL MULK M.

AHMED KHAN

## Portugal:

COMTE DE SÉLIR

## Roumania:

A. BELDIMAN

EDG. MAVROCORDATO

## Russia:

A. NÉLIDOW

MARTENS

N. TCHARYKOW

## Servia:

S. GROUÏTCH

M. MILOVANOVITCH

M. MILITCHEVITCH

## Siam:

CHATIDEJ

CORRAGONI D'ORELLI

LG. BHUVANARTH

## Sweden:

H. L. HAMMARSKJÖLD

## Switzerland:

CARLIN

## Turkey:

H. MISSAK

## F. PROCÉS-VERBAL OF ADHERENCE

There was signed in this city on the 14th of June, 1907, a protocol establishing, in respect to the Powers unrepresented at the First Peace Conference which have been invited to the the Second, the mode of adhesion to the Convention for the peaceful settlement of International Disputes, signed at The Hague, July 29, 1899.

Pursuant to the said protocol, the undersigned, Minister of Foreign Affairs for Her Majesty the Queen of the Netherlands, on this day opened the present procès-verbal intended to receive and furthermore to record, as they may be presented, the adhesions of the aforesaid Convention.

Done at The Hague, on the 25th of June, 1907, in a single copy, which shall remain in deposit in the archives of the Ministry of Foreign Affairs of the Netherlands and of which a duly certified copy shall be transmitted to each one of the Signatory Powers.

VAN TETS VAN GOUDRIAAN.

Successively adhered:

Argentina, June 15, 1907:

ROQUE SAENZ PENA

LUIS M. DRAGO

CARLOS RODRIGUEZ LAR-  
RETA

Brazil, June 15, 1907:

RUY BARBOSA

Bolivia, June 15, 1907:

CLAUDIO PINILLA

FERNANDO E. GUACHALLA

Chili, June 15, 1907:

DOMINGO GANA

AUGUSTO MATTE

CARLOS CONCHA

Colombia, June 15, 1907:

JORGE HOLGUIN

M. VARGAS

S. PEREZ TRIANA

Nicaragua, June 15, 1907:

CRISANTO MEDINA

Panama, June 15, 1907:

B. PORRAS

Paraguay, June 15, 1907:

E. MACHAÏN

Peru, June 15, 1907:

C. G. CANDAMO

Dominican Republic, June 15,  
1907:

APOLINAR TEJERA

DR. HENRIQUEZ Y CAR-  
VAJAL.

Venezuela, June 15, 1907:

J. G. FORTOUL

Cuba, June 15, 1907:	Uruguay, June 17, 1907:
ANTONIO S. DE BUSTAMANTE	JOSÉ BATLLE Y ORDONEZ
GONZALO DE QUESADA	JUAN P. CASTRO
MANUEL SANGUILY	Salvador, June 20, 1907:
Gautemala, June 15, 1907:	P. J. MATHEU
JOSÉ TIBLE MACHADO	S. PEREZ TRIANA
Haiti, June 15, 1907:	Ecuador, July 3, 1907:
JEAN JOSEPH DALBEMAR	VICTOR RENDON
PIERRE HUDICOURT	E. DORN Y DE ALSUA

### 3. THE RÈGLEMENT OF THE SECOND CONFERENCE

#### ARTICLE 1

The Second Peace Conference is composed of all the plenipotentiaries and technical delegates of the Powers which have signed or adhered to the conventions and acts signed at the First Peace Conference of 1899.

#### ARTICLE 2

After organizing its bureau, the Conference shall appoint commissions to study the questions comprised within its program.

The plenipotentiaries of the Powers are free to register on the lists of these commissions according to their own convenience and to appoint technical delegates to take part therein.

#### ARTICLE 3

The Conference shall appoint the president and vice-presidents of each commission. The commissions shall appoint their secretaries and their reporter.

#### ARTICLE 4

Each commission shall have the power to divide itself into sub-commissions which shall organize their own bureau.

#### ARTICLE 5

An editing committee for the purpose of coördinating the acts adopted by the Conference and preparing them in their



final form shall also be appointed by the Conference at the beginning of its labors.

#### ARTICLE 6

The members of the delegations are all authorized to take part in the deliberations at the plenary sessions of the Conference as well as in the commissions of which they form part. The members of one and the same delegation may mutually replace one another.

#### ARTICLE 7

The members of the Conference attending the meetings of the commissions of which they are not members shall not be entitled to take part in the deliberations without being specially authorized for this purpose by the presidents of the commissions.

#### ARTICLE 8

When a vote is taken each delegation shall have only one vote.

The vote shall be taken by roll call, in the alphabetical order of the Powers represented.

[The delegation of one Power may have itself represented by the delegation of another Power.]

#### ARTICLE 9

Every proposed resolution or desire to be discussed by the Conference must, as a general rule, be delivered in writing to the president, and be printed and distributed before being taken up for discussion.

#### ARTICLE 10

The public may be admitted to the plenary sessions of the Conference. Tickets shall be distributed for this purpose by the Secretary-General with the authorization of the president.

The Bureau may at any time decide that certain sessions shall not be public.

#### ARTICLE 11

The minutes of the plenary sessions of the Conference and of the commissions shall give a succinct résumé of the deliberations.

A proof copy of them shall be opportunely delivered to the members of the Conference and they shall not be read at the beginning of the sessions.

Each delegate shall have a right to request the insertion in full of his official declarations according to the text delivered by him to the secretary, and to make observations regarding the minutes.

The reports of the commissions and subcommissions shall be printed and distributed before being taken up for discussion.

#### ARTICLE 12

The French language is recognized as the official language of the deliberations and of the acts of the Conference.

The Secretary-General shall, with the consent of the speaker himself, see that speeches delivered in any other language are summarized orally in French.

## APPENDIX TO CHAPTER V.

### EXTRACT FROM WEST'S SYMBOLEOGRAPHY (1592-1594, EDITION OF 1627, PART II, pp. 136 ET. SEQ.), CONCERNING COMPROMISE AND ARBITREMENTS.

SECT. 1. A Compromise or Submission, *Arbitrium, Compromissum, Submissio*, is the facultie or power of pronouncing Sentence betweene persons at controversie, given to arbitrators by the parties mutuall privat consent, without publique authorite.

SECT. 2. Everie compromise is generall or speciall.

SECT. 3. A Generall Compromise is of all quarrells, actions, executions, and demands, &c.

SECT. 4. A speciall compromise is every submission to order, which is not so generall as when it is of certain matters, facts, or things only, as of Trespasse, or of all actions of trespasse, or of a pliant or debt, or detenue, &c.

SECT. 5. As of every other judgement, so of judgements which grow by compromise, there are two parts, the persons and the question.

SECT. 6. Persons chiefly regarded in compromise, are the striving parties & the Arbitrators.

SECT. 7. The parties striving be they between whom the controversie dependeth, and which compromise the same.

SECT. 8. And they must be two at the least, namely the plaintife and the defendant, of which sometime there be two or more of a side.

SECT. 9. The plaintife is he which mooveth the question.

The defendant is he against whom the question is mooved.

All persons both male and female may compromise, but such as are prohibited by nature or by law.

[SECTIONS 10-20 omitted. They enumerate the impediments to compromise: impediments in mind naturall; impediments in mind casuall; impediments in bodie; dumbnesse and deafnesse naturall and casuall; impediments legall; subjection, joynt power; coverture; death civil; compromise under duress; attainder and outlawrie; joynt power.]

SECT. 21. An arbitrator is an extraordinarie judge which is chosen, and hath power to judge, given to him by the only mutual consent, wil compromise and election of privat persons striving, to the end they may decide their controversies who because the controversie is committed to his pleasure and arbitrement, is termed an arbitrator, and for that it is done by the mutual promise or compromise of the parties, he is called Compromiss judex. Or a Judge having cognizance by the compromise of the parties; his power is larger than the power of any ordinarie or other extraordinarie

Judge appointed by a magistrate, for an Arbitrator hath power to judge according to the compromise after his owne mind, as well of the fact as of the law, not observing the formse of Law, but the other Judges are tyed to a prescript forme limited to them by the law or magistrat, of which they be onely executors. For which cause *Tully* saith well, *Aliud est iudicium, aliud arbitrium; nam iudicium est pecuniæ certae, arbitrium incertae; ad iudicium hoc modo venimus, ut tota litem aut abtineamus, aut amittamus; at arbitrium hoc modo adimus, ut neq; nihil neq; tantum quant postulamus consequamur*; whence springeth this old saying, He that putteth his coat to daying is like to loose a quarter.

SECT. 22. Seeing then the power of Arbitrators is such, and so great and uncontrollable, warinesse must be used in the choice of them. In which two things seeme necessarie to be regarded, namely that the arbitrators bee sufficient and indifferent.

SECT. 23. Touching their sufficiencie, such persons are to be elected as have sufficient skill of the matter compromitted, and have neither legall nor naturall impediments to give an upright sentence. Naturall impediments be through defect of mind or bodie, natural impediments through defect of mind be infancie, (for infants by reason of their tenderness of yeares, want discretion to mannage themselves and their own affairs) madnesse, and Ideocie, for they who are maimed with these blemishes, are utterly void of understanding. And although I have read some examples of sage sentences given by fooles, yet dare I not advise my friends to expect alwaies the like at their hands.

SECT. 24. A fooles arbitrement: That an hungrie beggar espying daintie cheare in cookes shop, hasted thither, and being set downe did eat a small piece of his owne bread, and incontinently received such wonderful comfort by the sweet smell of the cooks cates and sauces, whereof he tasted no bit, that he confessed his eager stomach was as well satisfied therewith, and had as good a repast as if he had indeed stuffed his panch with the best cheere there; which the Cooke hearing, strait wais with a stern countenance bids the poore caitife pay for his breakfast, whereat the simple guest was mightily amased, and the craftie cooke so much the more earnest; in so much as this poore man and the cooke were content therein to abide the ward of him that should next passe by: no sooner was the submission made, but thither commeth a most notorious naturall foole, to whom as their Judge they rehearsed the matter; which being heard, the Ideot caused the poore man to put so much monie betweene two basons as the covetous cooke exacted, and to shake them in the cooks hearing: which done, this Arbitrator awarded, that as the cooke had fed the poore man with the onely smell of his cates, so the poore man should pay him therefore with the onely sound of his coine, which sentence was highly approved of the hearers.

SECT. 25. A simple Magistrates Arbitrement: Not much unlike to this is that which is reported of a covetous Churle, who sorrowed extreemly for that he had lost a purse with one and twentie Angells in it. But an honest man having found the same, of meere conscience delivered it to the same churle, who not once thanking him that was the bringer, fell to account his coin, and finding onely twentie Angells in the purse, with great rigour



exacted the odde Angell; and because the honest man denied the finding thereof, hee convented him before a Magistrate of a Corporation, whose wealth and authoritie far exceeded his wit (as in such places commonly happeneth, for that affection and simplicitie be their ordinarie electors). The plaintife sweareth, there were one and twentie angels in the purse which he lost; the Defendant, that there were onely twentie in that which hee found. Whereupon the Magistrate pronounced, that the purse found was not the plaintife's, and therefore adjudged him to restore unto the defendant the purse with twentie Angells, leaving the plaintife to good fortune for the finding againe of his purse with one and twentie angels, I thinke a man may trie a thousand fooles in the like cases, before hee receive the like sentence.

SECT. 26. The defects of the bodie hindring judgement, are infirmities, by which the principall sences necessarie for the apprehension of knowledge or impaired as by deafnesse, dumbnesse, and blindnesse.

SECT. 27. And for indifferencie, it is good that the Arbitrators be void of malice and favour to either of the parties, that they be not notorious by outlawrie, excommunication, or suspected of any other notorious crime, that they be neither irreligious nor covetous: For albeit, as it is said, an Arbitrator hath herein absolute power, yet ought his judgement or censure to be sincere and incorrupt, according to right and equitie, without malice, flatterie, and every other vicious affection or perturbation which may in any sort lead him away from the right of justice and equitie.

Hitherto of persons in submission

SECT. 28. The question which containeth the matter of the arbitrement followeth.

The Question is a thing in controversie declared to the Judge or Arbitrator, to the end it may be him be decided.

SECT. 29. And everie question is either about the fact, or about right.

SECT. 30. A Question of the fact is, when such a fact is enquired of as doubtfull.

SECT. 31. The question of right is when the fact being known, it is yet doubtfull how much is thereby growne right and due to each partie by Law.

SECT. 32. And in everie question hereupon arising, it is to be considered whether the thing in question be arbitrable or no: for in vaine it is to com-promit things not arbitrable. Let us therefore see what things be arbitrable, and what not.

[SECT. 33. states "What things are arbitrable and what not," the former being "things and actions personall incertain," and the latter being "chattels reall or mixt, annuities, freeholds, debt upon arrerages of account before Auditors, things as were not in *rerum natura* at the time of the submission though they happen to bee before the award made, criminal offences, and matrimonial causes."]

SECT. 34. Now that wee have set forth the persons and things necessarie

in every compromise, it is good to consider such other circumstances as be requisite in the same.

Three things therefore beside the persons and things are meet to be observed in every compromise.

First, that every compromise be made by writing with the parties, covenants, or bonds, sufficient to bind their heirs and executors to performe the award which shall thereupon be made, that both the arbitrators may know their power, and the parties how far they are subject to their sentence; and also lest their labour and judgement therein should be frustrate for want of means to compell the same to be executed.

SECT. 35. Secondly, it is behovefull that the verie compromise arme the Arbitrators with sufficient authoritie to doe all things necessarie for the ending of the controversies, as to appoint times and places for their meeting, to examin and decide the matter compromitted, and to bring the parties with their proofs, evidences, and witnesses thither together before them, and to punish the persons defective, and to expound and correct such doubtfull sentences and questions as may arise upon their award incovenient to either parties, contrary to equitie and the arbitrators good meaning; which inconveniences could not by them be foreseene at the making of the award, as it oftentimes hapneth; for *temporis filia veritas*, truth is the daughter of time.

SECT. 36. Thirdly, that by the compromise convenient time and place bee limited for the yeelding up of their award to the parties or their attornies, deputies or assignes, lest the parties should otherwise bee long lingered with vaine hope of an endlesse end, and that the Arbitratours may before the set time finis their award; for whatsoever they doe arbitrate after the time appointed is void.

And it is al void that is not contained in the submission, or necessarily depending thereupon, as shal more largely appeare when we come to the doctrine of arbitrements.

The instrument of compromise or submission may be made in forme following:

[SECT. 37, 38 39 and 40 contain, respectively, form of compromise or submission, with covenants to perform the same, of binding the parties to perform the award, the condition of an obligation to perform an award, and the condition to perform an award of lands.]

SECT. 41. An arbitrator chosen cannot grant, or assigne over his authoritie of arbitration to any other, because it is but a nude power, which is not to be granted over: notwithstanding the opinion in 4 Ed. 3.20 to the contrarie. Neither doth the submission extend to give the arbitrators power to elect others.

[SECT. 42 discusses "Whether the Compromittors may discharge the Arbitrators, or no."]

SEC. 43. An arbitrement, or award therefore, *arbitramentum*, *laudum*,

*arbitratus, Libr. intration debt in arbitr. 2 et 3*, is nothing else but the very doome, order, and decree pronounced by arbitrators upon the controvesie for the ending whereof they were chosen by the striving parties.

SECT. 44. In the forme of every Arbitrement, five things are specially to be regarded.

First, that it be made according to the verie submission or compromise touching the things compromitted, and every other circumstance, as is said . . . .

Secondly, that it be a finall end of the controversies compromitted.

Thirdly, that it appoint either partie to give or doe unto the other some thing beneficiall in appearance at the least.

Fourthly, that the performance thereof be possible.

Fifthly, that there be a meanes how either party may by law attaine unto that which is awarded unto him.

For if it faile in any of these points, then is the whole arbitrement void and of none effect, as it doth manifestly appeare by these special cases following . . . .

[Examples of special cases omitted. Sections 45, 46 and 47 contain forms of arbitrements, which are omitted.]

SECT. 48. And when the Arbitrators have made their award, according to the submission, albeit perchance they be not bound to give notice thereof to the parties, yet it seemeth verie requisite, that they should in due time, before that either partie be to performe any part thereof, notifie the same unto them, lest otherwise they might break their bonds or covenants in that behalfe (if any such be) before they know the same. Notwithstanding, that the booke in 8.E.4.1.& 9. be doubtfull in that point.

SECT. 49. And thus, by that which hath bin discoursed, it sufficiently appeareth (as we think) that the scope and end of Arbitrements, and other Judgements, is all one: And chiefly, the finall determination of strife, suit, and controvesie. And so consequently their effects be almost equall. But the Lawes seeme more favourable to Arbitrements than other Judgements, insomuch, as by Arbitrators the strict course & tedious ceremonies of Law suites (which are most commonly wont to wearie suiters, and picke their purses) are cut off, and shorter decisions by them made, with little or no cost at all.

## APPENDIX TO CHAPTER VI

### 1. ELEMENTS FOR THE ELABORATION OF A CONVENTION TO BE CONCLUDED BY THE POWERS PARTICIPATING IN THE HAGUE CONFERENCE PRESENTED BY THE RUSSIAN DELEGATION OF 1899

#### A. GOOD OFFICES AND MEDIATION

##### ARTICLE 1

In order to prevent, as far as possible, recourse to force in international relations, the Signatory Powers are agreed to employ every effort to bring about by pacific means the solution of conflicts which may arise among them.

##### ARTICLE 2

In consequence the Signatory Powers are decided, in the event of serious disagreement or conflict, before appealing to arms, to have recourse, so far as circumstances will permit, to the good offices or mediation of one or more friendly Powers.

##### ARTICLE 3

In the event of mediation being spontaneously accepted by States in conflict, the aim of the mediatory Government consists in endeavoring to bring about a conciliation between the States.

##### ARTICLE 4

The rôle of the mediatory Government ceases from the moment when the compromise proposed by it, or the bases of a friendly agreement which it may have suggested, shall not have been accepted by the States in conflict.

##### ARTICLE 5

Should the Powers consider it advisable, in the event of a serious disagreement or conflict between civilized States regarding questions of political interest, the Powers not implicated in



the conflict shall offer of their own initiative, so far as circumstances are favorable, their good offices or their mediation to the disputing States in order to remove the difference that has arisen by proposing an amicable solution which, without affecting the interests of other States, shall be of a conciliatory nature in the best interests of the parties in dispute.

#### ARTICLE 6

It remains well understood that mediation and the employment of good offices, either at the instance of the parties in dispute or of neutral Powers, shall bear strictly the character of friendly counsel and in no way of compulsory force.<sup>1</sup>

#### (a) EXPLANATORY NOTE RELATING TO ARTICLE FIVE OF THE RUSSIAN PROJECT)

The Conference which is about to meet at The Hague is essentially distinguished from those which were held at Geneva (in 1864), at St. Petersburg (in 1868), and at Brussels (1874).

The purpose of these first conferences was to humanize war when it is once declared, whereas the meeting to be held at The Hague will seek above all the means of preventing the very declaration of war. The Conference of The Hague will therefore be a peace conference in the most absolute meaning of the words.

The practice of the Law of Nations has elaborated the whole series of means tending to prevent war by means of the specific settlement of international disputes, among which may be more particularly counted good offices, mediation, and arbitration. It seems natural enough that the Conference should occupy itself with the perfecting of the guarantees and means already existing for the insuring of permanent peace among nations, instead of seeking new means which have not been tested and sanctioned by practice. In this way the Conference will have to pay particular attention to the "good offices" and the "mediation" of third parties, that is, of Powers not implicated in the presumed conflict.

<sup>1</sup> Conférence Internationale de la Paix, 1899, part I, pp. 119-120.

Mediation should, without any doubt and by its very nature, be ranked among the most useful and most practical means of action of the Law of Nations, being a necessary consequence of that real community of material and moral interests which creates an international union among the various nations, mediation must inevitably acquire an ever-increasing importance and value as nations come closer together, and as their international interests develop. The advantage which is likely to be possessed by mediation, if it is compared with the other means employed to settle international disputes, is above all the remarkable elasticity of its actions, the facility with which it adapts itself to the peculiar circumstances of every given case, and the variety of forms which it offers owing to this facility. Appealing to the free consent of the parties, mediation does not in any way affect the principle of their sovereignty, nor of the liberty and independence of nations. It exerts an influence on their free judgment, without ever disputing it or questioning it.

There is no doubt but that arbitration is, generally speaking, a more effective and radical means than mediation, but on the other hand, arbitration being a means of action of a legal nature, its application is essentially and even exclusively restricted to cases in which there is a conflict of international laws, whereas mediation, being a means of a political character, is equally applicable to conflicts of interest, which most often threaten the peace between nations. Finally, it is equally essential to note that mediation is distinguished from other similar means of action by surprising simplicity of application which requires no preliminary preparation. This instrument of the daily practice of diplomacy, handled with tact and skill and directed by a sincere desire to serve the work of peace, appears destined to play a prominent and beneficent rule in the future.

Nevertheless, mediation has hitherto played a most modest part in the settlement of international controversies. The truth of this observation is verified even by the history of the most recent conflicts.

If we seek the reason of this fact, we must first of all consider how unsatisfactory the very question of mediation appears in theory as well as in the practice of the Law of Nations.

According to Article VIII of the Treaty of Paris, the Sublime

Porte as well as the other powers signing this treaty, are obliged to submit all disagreements arising between any of them to the mediation of the other powers, for the sake of preventing the use of force.

Giving a more general scope to this idea, Article XXIII of the protocol of the Congress of Paris, inserted at the suggestion of Lord Clarendon, the British plenipotentiary, expresses the hope that nations between which serious disagreements arise may request the good offices of a friendly power as far as circumstances permit, rather than to have recourse to arms. Similarly, at the African Conference, held at Berlin, in 1885, the powers mutually pledged themselves to have recourse first of all to the mediation of one or more neutral nations in case disagreements should arise among them concerning the Congo and its basin.

The stipulations cited above are inspired by the same thought, expressed in practically identical terms. They compel all the nations concerned in the controversy to ask mediation, but they do not mention the duty of the neutral powers to propose it. From this standpoint, mediation would impose duties on the nations directly concerned but would impose none on the neutral nations. This character of mediation, very irregular from a theoretical standpoint, has besides the disadvantage of rendering it incapable of realization from a practical standpoint. A request for mediation necessarily presupposes a previous agreement among the nations concerned with regard to the necessity and the appropriateness of mediation. Now, such an agreement is not always possible during the ardor of a conflict between diametrically opposed interests. At all events, there can be no question of making it compulsory for nations to ask mediation when their interests are at stake, and this especially for the reason that such a request requires an agreement between minds which are opposed and a mutual consent of the parties regarding the choice of the mediator.

The treaties, unfortunately not very numerous, which render it compulsory to ask for arbitration, at the same time regulate, in most cases beforehand, the organization of the court called upon to render the award, such organization not depending on

the consent or nonconsent of the interested parties.<sup>1</sup> It goes without saying that there can be no question in treaties of the compulsory determination for the parties of the choice of a mediator, the counsels of whom can have but a moral force, determined by the degree of respect and confidence which he inspires in the interested parties. The appointment of the mediators must necessarily be made by consent of the parties. As this consent depends absolutely on their willingness and may even be impossible of realization even when this willingness is shown, it follows that we should not consider it compulsory on the nations directly interested to ask for mediation. Even if treaties impose such a duty on nations, in case of controversy, such a duty would as a general rule remain a dead letter, for conventions can not compel nations to choose any particular arbitrator in spite of everything.

This opinion is confirmed by the history of international relations since the time of the Congress of Paris in 1856. Thus, during the last forty years, there have been several cases in which neutral nations, in pursuance to Article XXIII of the protocol of the Congress of Paris, offered their mediation and good offices to nations at variance; but there has not been a single case in which nations at variance have requested the mediation of neutral powers. Last year, at the time of the dispute between France and England regarding Fachoda, neither of these powers thought of having recourse to the stipulations established by the Berlin Conference of 1885 or asked the mediation of a third Power. Other examples of a similar significance might be quoted.

As regards the obligation of neutral nations to offer their mediation to nations at variance, not having been established by treaties, it is not recognized or observed by any one. Some authors have gone so far as to assert in theory that neutral nations are not only not obliged but do not even have a right to offer their mediation to nations in dispute. Bluntschli and Heffter considered mediation as a dangerous and injurious interference in the affairs of others. Hautefeuille and Galiani advised nations carefully to refrain from mediation for fear of

<sup>1</sup> See, for example, Article 16 of the Universal Postal Convention signed at Berne, 1874, and Article 8 of the Treaty signed at Washington, 1890.



losing the friendship of one of the parties without sufficient reason. In fact we may cite a number of actual instances of serious conflicts which subsequently ended in war and which did not suggest to neutrals the least attempt to offer their mediation. However, offers of this kind, especially if they had come simultaneously from several powers, might have prevented wars whose consequences have been incalculable to all the nations constituting the international commonwealth.

In many cases the offer of mediation is made so late and in such uncertain terms that it can not avert war. Thus, for instance, the French Government refused the good offices of England in 1870 when the conflict between France and Germany broke out. Finally, it often happens that mediation is offered not for the purpose of preventing war but of putting a stop to it.

Many recent wars, such as the Austro-Prussian War of 1866, that between Chili, Peru, and Bolivia, in 1882, that between Greece and Turkey in 1897, and others still, have been terminated by the mediation of neutral powers. If these same powers had used all the energy to prevent these wars that they exerted in putting them down, it is possible that Europe might have been spared more than one armed conflict.

After what has just been said, it is not difficult to point out the course to be followed by the Conference in order to emphasize the importance and increase the scope of mediation by making it a permanent and necessary institution of international law. Innumerable and mutually involved interests envelop civilized nations with a close and inextricable network. The principle of isolation, which recently still dominated the political existence of every nation, has now given place to a close solidarity of interests, and to a common participation in the moral and material benefits of civilization.

Modern nations can not remain indifferent to international conflicts, no matter where they may arise or who may be the parties at variance. At the present time war, even when occurring between two nations, appears as an international nuisance. In order to combat this nuisance, means are required which have a universal application. The efforts of all nations and of every nation individually must be combined.

Looking at the matter in this light, every nation should be

obliged to use its efforts and to put into operation all the means at its disposal for the purpose of preventing conflicts which are likely to threaten the peace, while respecting, of course, the independence of other sovereign nations. In particular, every nation should, as far as circumstances permit, offer its mediation to the nations at variance as soon as there is the least hope of preventing the dreadful evils of war by this means.

It is because they realize the serious consequences which a certain outcome of the war may have on the international commonwealth that neutral nations usually offer their mediation to the belligerents for the purpose of concluding peace. Mediation of this kind, being generally made by several nations in common, often renders it impossible for the victor to derive from his victory the advantages for which the war was undertaken.

There is no doubt but that neutral nations are concerned not only in the results of the war but also in the fact that it has taken place. It follows that the interests of neutral nations require that mediation be offered by them not only in order to stop a war already begun but also, and more especially, in order to prevent its breaking out. This is really also in the interest of the nations at variance, especially in view of the fact that every belligerent nation, upon war breaking out, is interested nowadays in knowing the attitude of the neutral powers with regard to the conflict so that they may be able to calculate and gauge with precision not only the power of resistance of their adversary during the war, but also the power which will be exerted by the neutral powers when peace is concluded.

The theory of international law, as expounded by the most acknowledged authorities on the subject, such as Travers-Twiss, Philimore, Pradier-Fodéré, de Martens and others, has long regarded mediation as the duty of neutral nations. The peace conference may deem it useful to proclaim this duty to all humanity, in order to invest mediation with all the authority of a powerful instrument of peace.<sup>1</sup>

<sup>1</sup> *Conférence Internationale de la Paix*, 1899, part I, pp. 121-124.

## B. INTERNATIONAL COMMISSIONS OF INQUIRY

## ARTICLE 14

In cases in which divergences of views occur between the Signatory States in connection with local circumstances giving rise to litigation of an international character which cannot be settled by the ordinary diplomatic means, but in which neither the honor nor the vital interests of these States are engaged, the Governments interested agree to institute an International Commission of Inquiry in order to arrive at the causes of the disagreement and to clear up on the spot, by an impartial and conscientious examination, all questions of fact.

## ARTICLE 15

These international Commissions shall be constituted as follows: Each Government interested shall appoint two members, and the four members united shall choose a fifth member who shall at the same time be president of the Commission. If the votes shall be divided for the choice of a president the two Governments interested shall appeal either to another Government or to a third party, who shall appoint the president of the Commission.

## ARTICLE 16

Governments between which a grave disagreement or conflict shall arise in the circumstances indicated above, shall engage to furnish the Commission of Inquiry with all means and facilities necessary for a thorough and conscientious study of the facts.

## ARTICLE 17

The International Commission of Inquiry, after having acquainted itself with the circumstances out of which the disagreement or conflict arose, shall submit to the Governments interested a report signed by all the members of the Commission.

## ARTICLE 18

The report of the Commission of Inquiry shall in no wise have the character of an arbitration judgment. It leaves the Governments in conflict at full liberty, either to conclude a

friendly arrangement on the basis of the said report, or to have recourse to Arbitration by concluding an agreement *ad hoc*, or else by resorting to the active measures allowable in the mutual relations between nations.<sup>1</sup>

C. A DRAFT CODE OF ARBITRATION, PROPOSED BY THE  
RUSSIAN DELEGATION.

ARTICLE 1

The Signatory Powers have approved the principles and rules below mentioned for the procedure of Arbitration among nations, save for the modifications which may be introduced in each particular case by mutual agreement by the Governments in dispute.

ARTICLE 2

The States interested, having accepted Arbitration, shall sign a special Act (*compromis*), in which are clearly set forth the questions submitted to the decision of the Arbitrator, and the full facts and the considerations of law connected with them, and a formal undertaking shall be given by the contracting parties to submit, in good faith and without subsequent appeal, to the Arbitral award which shall be pronounced.

ARTICLE 3

The Arbitration Conventions thus concluded by the States concerned with their full consent may provide for Arbitration either for all disputes arising between them, or for disputes of a certain fixed category.

ARTICLE 4

The Governments interested may entrust the functions of Arbitrator to the Sovereign or chief of the State of a third Power, with the consent of this last. They may also entrust these functions either to a single person selected by them or to an Arbitration Tribunal appointed for the purpose. In the latter event, and in view of the importance of the dispute, the Arbitration Tribunal may be constituted in the following manner: Each contracting party shall choose two Arbitrators.

<sup>1</sup> Conférence Internationale de la Paix, 1899, part I, p. 121.



These Arbitrators having met, shall agree upon the umpire, who will be *de jure* the president of the Tribunal. In the event of a division of votes the disputing Governments will appeal by a common accord to a third Government or a third person, who will appoint the umpire.

#### ARTICLE 5

If the disputing parties do not agree on the choice of the third Government or third person, mentioned in the preceding article, each of these parties shall appoint a Power not implicated in the dispute, in order that the Power thus chosen by the disputing parties may appoint an umpire by common agreement.

#### ARTICLE 6

The incompetence or inadmissibility of one only of the above-mentioned Arbitrators, or his refusal to accept the office of Arbitrator, once his consent has been given, or the death of an Arbitrator, invalidates the entire Agreement (*compromis*), except in the case where these circumstances are foreseen and provided for by common agreement between the contracting parties.

#### ARTICLE 7

The Arbitration Tribunal shall meet at a place designated either by the Contracting States or by the members of the Tribunal. The meeting place can only be changed by a fresh agreement between the interested Governments, or, in case of *force majeure*, on the initiative of the Tribunal itself.

#### ARTICLE 8

Disputing States have the right to appoint delegates or special agents attached to the Tribunal of Arbitration, and empowered to act as intermediaries between the Tribunal and the Governments interested. Besides these agents the above-mentioned Governments are authorized to nominate councilors or advocates to defend their rights and interests before the Tribunal of Arbitration.

#### ARTICLE 9

The Tribunal of Arbitration shall decide in what language the deliberations and discussions of the parties shall be held.

## ARTICLE 10

The procedure of Arbitration shall generally be divided into two parts—namely, preliminary and definitive, the first consisting in the communication to the members of the Tribunal by the agents of the Contracting States, of all the documents and arguments printed or written regarding the questions in dispute; and the second, definitive or oral, in discussions before the Tribunal of Arbitration.

## ARTICLE 11

On the conclusion of the preliminary procedure the discussions before the Arbitration Tribunal will begin and will be directed by the President. Records of the whole proceedings will be made by secretaries appointed by the President of the Tribunal. These Records will alone have legal force.

## ARTICLE 12

The preliminary procedure having been ended, the Arbitration Tribunal shall have the right to reject all new documents which the representatives of the parties may desire to submit to it.

## ARTICLE 13

The Arbitration Tribunal, nevertheless, always remains absolutely free to take into consideration new documents or records of which the delegates or councilors of the Governments in dispute have taken advantage in their explanation before the Tribunal.

The latter has the right to demand the production of these documents, and to notify them to the opposing party.

## ARTICLE 14

The Arbitration Tribunal has, besides, the right to call upon the agents of the Parties to submit all the documents or explanations which it requires.

## ARTICLE 15

The agents and councilors of the Governments in dispute shall be authorized to lay before the Tribunal orally all the

explanations and proofs in support of the cause they have to defend.

#### ARTICLE 16

The same agents and councilors also have the right to lay before the Tribunal motions on the subjects under discussion. The decisions of the Tribunal concerning these motions are definitive, and cannot give rise to any discussion.

#### ARTICLE 17

The members of the Arbitration Tribunal have the right to put questions to the agents or councilors of the Contracting Parties, or to ask for enlightenment on doubtful points. Neither questions submitted nor observations made by members of the Tribunal in the course of the deliberations shall be regarded as an expression of opinion by the Tribunal as a whole or by the individual members composing it.

#### ARTICLE 18

The Arbitration Tribunal is alone authorized to determine its competence by the interpretation of the clauses of the Agreement (*compromis*) and in accordance with the principles of international law, with due consideration for any special treaties which may be involved.

#### ARTICLE 19

The Arbitration Tribunal has the right to establish rules of procedure, and to determine the manner and periods of time in which each party is to present its documents, and to decide on the interpretation of the documents produced and communicated to the two Parties.

#### ARTICLE 20

On the agents and councilors of the litigant Governments having presented all the explanations and proofs in defense of their respective pleas, the President of the Arbitration Tribunal will close the debates.

#### ARTICLE 21

The deliberations of the members of the Tribunal on the ground of litigation are to be held with closed doors. Every

decision, whether definitive or provisional, is taken by the majority of the members present. The refusal of a single member of the Tribunal to take part in the voting must be stated in the records.

#### ARTICLE 22

The Arbitral Award, arrived at by a majority of votes, must be drawn up in writing and signed by each of the members of the Arbitration Tribunal. Those members of the Tribunal who are in the minority shall, when signing, state their disagreement with the Award.

#### ARTICLE 23

The Award shall be solemnly read at a public sitting of the Tribunal and in the presence of the agents and councilors of the Governments in dispute.

#### ARTICLE 24

The Award, duly made and notified to the agents of the Governments in dispute, shall decide, definitely and without appeal, the dispute between the Parties, and close the arbitration proceedings instituted by the Agreement (*compromis*).

#### ARTICLE 25

Each Party to a dispute will defray its own expenses and half the expenses of the Arbitration Tribunal, without prejudice to the decision of the Tribunal regarding any indemnity which one or other of the Parties may be ordered to pay.

#### ARTICLE 26

The Arbitral Award is null and void in case of the Reference (*compromis*) being invalid, or if the Tribunal has exceeded its powers, or when corruption is proved on the part of one of the arbitrators.

The above regulations regarding the Arbitration Tribunal, from Section 7, beginning with the words, "The Arbitration Tribunal shall meet," apply equally to cases in which Arbitration is entrusted to a single individual chosen by the Governments interested. In a case in which the Sovereign or chief of a State gives his Award personally as Arbitrator, the pro-



cedure would be determined by the Sovereign or the chief of the State himself.<sup>1</sup>

#### D. [RUSSIAN PROPOSALS CONCERNING AN ARBITRATION TRIBUNAL

##### (a) ARTICLES WHICH MIGHT REPLACE ARTICLES I, 13.

1. With a view to consolidate, as far as possible, the practice of International Arbitration, the Contracting Powers have agreed to form, for a period of ——— years, an Arbitration Tribunal, to which should be referred the cases of obligatory Arbitration enumerated in Article I, 10, unless the interested Powers agree on the establishment of a special Arbitration Tribunal for the solution of the dispute that has arisen between them.

The Powers in dispute may also have recourse to the Tribunal referred to above in all cases of optional Arbitration, if a special agreement on this subject be arrived at between them.

It is understood that all the Powers, without excepting the noncontracting Powers, or those which have made reservations, may submit their differences to this Tribunal by addressing the Permanent Bureau, provided for by Article — of Appendix A.

2. The organization of the Arbitration Tribunal is shown in Appendix A of the present Article.

The organization of the Arbitration Tribunals instituted by special agreements between the Powers in dispute, and also the rules of procedure to be followed during the examination of the case, and the delivery of the Arbitral Award, are determined in Appendix B (Code of Arbitration).

The arrangements contained in this latter Appendix may be modified by a special agreement between the States which have recourse to Arbitration.

##### (b) ANNEX TO THE RUSSIAN PROPOSALS

In case of the acceptance of Articles 1 and 2, it would be expedient:

1. To draw up Appendix A, mentioned in the Article.

2. To introduce corresponding modifications into the Draft of the Arbitration Code.

(c) APPENDIX A.

MENTIONED IN ADDITIONAL ARTICLE a)2 OF THE RUSSIAN PROPOSALS

In default of a Special Convention (*compromis*), the Arbitration Tribunal provided for by Article 13 shall be constituted on the following basis:

1. The Contracting Parties establish a Permanent Tribunal for the settlement of international disputes which shall be referred to it by the contending Powers by virtue of Article 13 of the present Convention.

2. The Conference shall designate, for the period which shall elapse before the meeting of a new Conference, five Powers, in order that each of them, in case of a request for Arbitration, may appoint a Judge, either from the number of their subjects, or outside that number.

The Judges thus appointed constitute the Arbitration Tribunal competent for the case that has arisen.

3. If amongst the Powers in dispute were one or more Powers not represented in the Arbitration Tribunal, in virtue of the preceding Article, each of the two Parties in dispute shall have the right to have itself represented in it by a person of its choice as Judge, having the same rights as the other members of the said Tribunal.

4. The Tribunal shall from amongst its members choose its President, who, in case of an equal division of votes, shall have the casting vote.

5. A Permanent Bureau of Arbitration shall be appointed by the five Powers who shall be designated in virtue of the present Act to constitute the Arbitration Tribunal. They shall draw up the Regulations of this Bureau, appoint its employees, provide for replacing them when need arises, and fix their emoluments. This Bureau, which shall be located at The Hague, shall consist of a General Secretary, an Assistant Secretary, a Recorder, and an adequate staff, which shall be appointed by the General Secretary.

6. The expenses of maintenance of this Bureau shall be

divided amongst the States in the proportion fixed for the International Postal Bureau.

7. The Bureau shall annually render an account of its work to the five Powers who have appointed it, and these shall communicate the Report to the other Powers.

8. The Powers between whom a dispute has arisen shall apply to the Bureau, and furnish to it the necessary documents. The Bureau shall advise the five Powers above mentioned, who shall without delay form the Tribunal. This Tribunal shall, as a rule, meet at The Hague; or it may meet in some other town, if an agreement to that effect be arrived at amongst the interested States.

9. During the time that the Tribunal is at work, the Bureau shall serve as its Secretariat. It shall follow the Tribunal in case of removal. The archives of the International Arbitration shall be deposited at the Bureau.

10. The procedure of the above Tribunal shall be governed by the rules of the Code of Arbitration.<sup>1</sup>

## 2. THE BRITISH ARBITRATION PROPOSALS PERMANENT ARBITRATION TRIBUNAL

### A. SIR JULIAN PAUNCEFOTE'S FIRST PROPOSAL

#### ARTICLE 1

With the view of facilitating an immediate recourse to Arbitration on the part of those States who may not succeed in settling their differences by diplomatic means, the Signatory Powers have undertaken to organize in the following manner a permanent Tribunal of Arbitration, accessible at all times, and governed by the code of Arbitration prescribed in this Convention, so far as it may be applicable, and in conformity with stipulations made in arrangements decided upon between the parties in litigation.

#### ARTICLE 2

To this effect a central office will be established permanently at X, where the archives of the Tribunal will be preserved, and which will be entrusted with the conduct of its official business.

<sup>1</sup> Conférence Internationale de la Paix, 1899, part I., pp. 128-129.

A permanent Secretary, an Archivist, and sufficient staff will be appointed who will reside on the spot. The office will be the intermediary for communications relative to the meeting of the Tribunal at the instance of the parties in litigation.

### ARTICLE 3

Each Signatory Power will transmit to the others the names of two persons of its nationality, recognized in their country as jurists or publicists of merit, enjoying the highest reputation for integrity, disposed to accept the functions of Arbitrators, and possessing all the necessary qualities. Persons thus designated will be Members of the Tribunal, and will be inscribed as such in the central office. In case of the death or retirement of a Member of the Tribunal, provision will be made for his being replaced in the same manner as for his nomination.

### ARTICLE 4

The Signatory Powers, desiring to apply to the Tribunal for the pacific settlement of differences which may arise amongst them, will notify this desire to the Secretary of the central office, which will then furnish them immediately with a list of the Members of the Tribunal. The Powers in question will thereupon select from this list the number of Arbitrators agreed upon in the arrangements. They will have, moreover, the power of adding Arbitrators other than those whose names are inscribed in the list. The Arbitrators thus chosen will form the Tribunal for the Arbitration, and will meet on the date fixed by the parties in litigation. The Tribunal will sit generally at X, but will have the power of sitting elsewhere, and of changing its place from time to time, according to circumstances, as may suit its convenience, or that of the parties in litigation.

### ARTICLE 5

Any State, although not a Signatory Power, will be able to have recourse to the Tribunal under the conditions prescribed by the regulations.

### ARTICLE 6

The Government X is directed to install at X in the name of the Signatory Powers, as soon as possible after the ratification



of this Convention, a permanent Council of Administration composed of five Members and one Secretary. It will be the duty of the Council to establish and organize a central office, which will be under its direction and control. It will issue from time to time the necessary regulations for the proper working of the central office, and will also settle all questions which may arise concerning the working of the Tribunal, or which may be submitted to it by the central bureau. The Council will have absolute power as regards the nomination, the suspension, or the dismissal of all functionaries or employees. It will fix salaries and control general expenses. The Council will elect its president, who will have a preponderating voice. The presence of three Members will suffice to constitute a quorum, and decisions will be taken by a majority of votes. The fees of the Members of the Council will be fixed by agreement between the Signatory Powers.

#### ARTICLE 7

The Signatory Powers agree to contribute in equal shares the expenses of the Administrative Council and the central office. The expenses of each arbitration will be chargeable in equal parts to the States in litigation.

#### B. SIR JULIAN PAUNCEFOTE'S NEW PROPOSAL

##### TO REPLACE ARTICLE 6

There shall be constituted at The Hague a Permanent Council, composed of the Representatives of the Signatory Powers residing in that city, and the Minister for Foreign Affairs of the Netherlands, as soon as possible after the ratification of the present Convention. This Council shall be commissioned to establish and organize a Central Bureau, which shall remain under its direction and control. It shall take steps to establish the Tribunal; it shall issue from time to time the regulations necessary for the proper conduct of the Central Bureau. Similarly it shall decide all questions which may arise relating to working of the Tribunal, or refer them to the Signatory Powers. It shall have absolute power as to the appointment, suspension

or dismissal of the officers and employees of the Central Bureau. It shall fix their salaries and emoluments, and have control of the general expenditure. The presence of five members at a meeting duly summoned shall constitute a quorum, and the decisions shall be taken by a majority of votes.<sup>1</sup>

### 3. THE AMERICAN SCHEME

#### PROPOSAL FOR AN INTERNATIONAL TRIBUNAL

*Resolved*, That in order to aid in the prevention of armed conflicts by pacific means, the representatives of the Sovereign Powers assembled together in this Conference be and they hereby are requested to propose to their respective Governments a series of negotiations for the adoption of a general Treaty, having for its object the following plan, with such modifications as may be essential to secure the adhesion of at least nine Sovereign Powers, four of whom at least shall have been signatories of the Declaration of Paris, the German Empire being for this purpose the successor of Prussia, and the Kingdom of Italy the successor of Sardinia:

#### ARTICLE 1

The Tribunal shall be composed of persons nominated on account of their personal integrity and learning in international law by a majority of the members of the highest Court at the time existing in each of the adhering States, one from each Sovereign State participating in the Treaty, and shall hold office until their successors are nominated by the same body and duly appointed.

#### ARTICLE 2

The Tribunal shall meet for organization at a time and place to be agreed upon by the several Governments, but not later than six months after the general Treaty shall be ratified by nine Powers as hereinbefore proposed, and shall organize itself by the appointment of a permanent clerk, and such other officers as may be found necessary, but without conferring any distinction upon its own members. The Tribunal shall be empowered to fix its place of session and to change the same

<sup>1</sup> Conférence Internationale de la Paix, 1899, part I, pp. 134-136.

from time to time as the interests of justice or the convenience of the litigants may seem to require, and to fix its own rules of procedure.

### ARTICLE 3

The Tribunal shall be of a permanent character, and shall be always open for the filing of new cases, subject to its own rules of procedure, either by the contracting nations or by others that may choose to submit them, and all cases and counter-cases, with the testimony and arguments by which they are to be supported or answered, are to be in writing or in print. All cases, counter-cases, evidence, arguments, or opinions, expressing judgment, are to be accessible after the award has been given to all who will pay the necessary charges of transcription.

### ARTICLE 4

Any and all questions of disagreement between Signatory Powers may, by mutual consent, be submitted by the nations concerned to this International Tribunal for decision, but every such submission shall be accompanied by an undertaking to accept the award.

### ARTICLE 5

The bench of Judges for each particular case shall consist, as may be agreed upon by the litigating nations, either of the entire bench or of any smaller uneven number, not less than three to be chosen from the whole Court. In the event of a bench of three Judges only, no one of those shall be either a native subject or a citizen of the States whose interests are in litigation in the case.

### ARTICLE 6

The general expenses of the Tribunal are to be equally divided, or upon some equitable basis, between the adherent Powers, but those arising from each particular case shall be provided for as may be directed by the Tribunal. The presentation of a case wherein one or both of the parties may be a non-adherent State shall be admitted only upon condition of a mutual agreement that the States so litigating shall pay respectively a sum to be fixed by the Tribunal for the expenses of the adjudication. The salaries of the Judges may be so adjusted as to be paid

only when actually engaged in the duties of the Court. Where one or both of the parties are non-adherent States, they shall only be admitted on condition that the litigating States come to a common agreement to pay respectively such sum as the Tribunal shall fix to cover the expenses of the proceedings.

#### ARTICLE 7

Every litigant before the International Tribunal shall have a right to a rehearing of the case before the same Judges within three months after the notification of the decision, on alleging newly-discovered evidence or submitting questions of law not heard and decided at the former hearing.

#### ARTICLE 8

This Treaty shall become operative when nine Sovereign States such as are indicated in the resolution shall have ratified its provisions.<sup>1</sup>

### 4. THE ITALIAN PROPOSALS

With the object of preventing or putting a stop to international conflicts, the Peace Conference assembled at The Hague has resolved to submit to the Governments represented the following Articles, which are to be converted into international stipulations:

#### ARTICLE 1

In the event of the imminence of a conflict between two or more Powers, and after the failure of all attempts at conciliation by means of indirect negotiations, the Contending Parties will be obliged to have recourse to mediation or Arbitration in the cases indicated by the present Act.

#### ARTICLE 2

In all other cases mediation or Arbitration will be recommended by the Signatory Powers, but will remain optional.

#### ARTICLE 3

Each of the Signatory Powers not involved in the conflict has, in all cases, even during hostilities, the right to offer to the

<sup>1</sup> Conférence Internationale de la Paix, 1899, part I, pp. 136-137.



Contending Parties its good offices or its mediation, or to propose to them to have recourse to the mediation of another Power equally neutral, or to Arbitration. This offer or proposal cannot be considered by one or the other of the Contending Parties as an unfriendly act, even in cases where mediation and Arbitration, not being obligatory, would be rejected.

#### ARTICLE 4

A demand for, or an offer of, mediation has priority over a proposal of Arbitration; but Arbitration may, or must be proposed, according to the circumstances of the case, not only when there is no demand for an offer of mediation, but also when mediation would have been rejected or would not have led to conciliation.

#### ARTICLE 5

A proposal of mediation or Arbitration, so long as it has not been formally accepted by all the Contending Parties, cannot have the effect, unless there be a Convention to the contrary, of interrupting, delaying, or impeding mobilization and other preparatory measures, or military operations in progress.

#### ARTICLE 6

Recourse to mediation or Arbitration in conformity with Article 1 is obligatory in case:

- (1).....
- (2).....<sup>1</sup>

<sup>1</sup> Conférence Internationale de la Paix, 1899, part I, pp. 137-138.

## APPENDIX TO CHAPTER VII

### 1. THE RUSSIAN PROPOSAL OF INTERNATIONAL ARBITRATION

#### ARTICLE 7

In so far as regards a dispute relating to questions of right, and primarily to those affecting the interpretation or application of treaties in force, Arbitration is recognized by the Signatory Powers as being the most efficacious and most equitable means of settling these disputes in a friendly manner.

#### ARTICLE 8

The Contracting Powers therefore undertake to have recourse to Arbitration in cases relating to questions of the above-mentioned order, so far as these affect neither the vital interests nor the national honor of the parties in dispute.

#### ARTICLE 9

Each State remains the sole judge of the question whether this or that case shall be submitted to Arbitration, excepting the cases enumerated in the following article, where the Signatory Powers consider Arbitration as obligatory.

#### ARTICLE 10

From and after the ratification of the present Treaty by all the Signatory Powers, Arbitration shall be obligatory in the following cases, so far as they do not affect vital interests or the national honor of the contracting States:

I. In the case of differences or conflicts regarding pecuniary damages suffered by the State or its citizens, in consequence of illegal or negligent action on the part of any State or the citizens of the latter.

II. In the case of disagreements or conflicts regarding the interpretation or application of treaties or Conventions upon the following subjects:

1. Treaties concerning postal and telegraphic service and railways, as well as those having for their object the protection of submarine telegraphic cables; rules concerning the means of preventing collisions on the high seas; Conventions concerning the navigation of international rivers and interoceanic canals.

2. Conventions concerning the protection of literary and artistic property, as well as industrial and proprietary rights (patents, trade-marks, and commercial names); Conventions regarding monetary affairs, weights and measures; Conventions regarding sanitary affairs and veterinary precautions and measures against the phylloxera.

3. Conventions regarding inheritances, extradition, and mutual judicial assistance.

4. Boundary Conventions or treaties, so far as they concern purely technical, and not political, questions.

#### ARTICLE 11

The above list may be completed by subsequent arrangements among the Signatory Powers. Moreover, each Power shall be able to enter into a special arrangement with another Power for the purpose of rendering Arbitration obligatory in the above-mentioned cases before the general ratification, and also to extend the scope of Arbitration to all cases which it is considered possible to submit to it.

#### ARTICLE 12

In all other cases of international conflicts not mentioned in the above articles, Arbitration, while certainly being very desirable and recommended by the present Act, is nevertheless purely facultative—that is to say, it can only be applied on the spontaneous initiative of one of the parties in dispute and with the express consent of the other parties.

#### ARTICLE 13

With the view of facilitating recourse to Arbitration and its application, the Signatory Powers are agreed to formulate a

common arrangement for the employment of International Arbitration and for the fundamental principles to be observed in the drawing up of the rules of procedure to be followed pending the inquiry into the dispute and the pronouncement of the decision of the Arbitrators. The application of these fundamental principles, as also of the Arbitration procedure indicated in the Appendix to the present article, may be modified by virtue of a special arrangement between States which may have recourse to arbitration.<sup>1</sup>

#### A. EXPLANATORY NOTE OF THE RUSSIAN DELEGATION RELATING TO ARTICLE X OF THE RUSSIAN PROJECT

When entering on an examination of the question of arbitration, we must bear in mind above all the essential difference between compulsory and optional arbitration.

As a general proposition, it is hard to imagine any disagreement of a legal nature arising within the province of positive international law which could not, by virtue of an agreement between the parties, be settled by means of optional international arbitration. Even in case international law, which is unfortunately still very defective, does not afford a generally recognized rule for the solution of a particular question, the agreement to arbitrate concluded between the parties prior to the arbitration proceedings may nevertheless create a rule for this purpose, and in this manner greatly facilitate the task of the arbitrator.

It is different in a case of compulsory arbitration, which does not depend on the parties having consented specially to it. It goes without saying that such arbitration can not be applied to all cases and to all kinds of controversies. There is no government that would consent to assume in advance the obligation to submit to the decision of an Arbitration Court any difference which might arise within the international domain, provided such difference affected the national honor, its paramount interests, or its inalienable possessions. At present the mutual rights and obligations of nations are determined to a notable degree by the whole body of what are called political treaties, which

<sup>1</sup> Conférence Internationale de la Paix, 1899, part I, pp. 120-121.



are nothing but the temporary expression of the casual and transitory relations between the various national forces. These treaties bind the freedom of action of the parties as long as the political conditions under which they were created remain unchanged. When these conditions change, the rights and obligations flowing from these treaties also necessarily change. As a general rule, conflicts arising within the domain of political treaties do not, in the majority of cases, relate so much to a difference of interpretation of any particular rule as to the changes to be made in or the complete abolition of the rule itself.

The powers which take an active part in the political life of Europe can not therefore submit conflicts arising within the domain of political treaties to the examination of a court of arbitration, in the eyes of which a rule established by a treaty would be just as binding and inviolable as would a rule established by positive law in the eyes of any National Court.

From the standpoint of practical politics, the impossibility of universal compulsory arbitration therefore appears evident.

However, on the other hand, there is no doubt that differences often arise in international life to the solution of which arbitration can be applied at all times and in an absolute manner. These are questions which concern exclusively special points of law and which do not affect either the vital interests or the national honor of the nations. One can not help wishing that the Peace Conference would lay down arbitration as a permanent and compulsory course of action in regard to such questions.

The recognition of compulsory arbitration, even though it were within the most restricted limits, would affirm the principles of law in the relations between nations, would guarantee them against infractions and impairment, and would neutralize, so to speak, vast domains of international law to a greater or less extent. To the nations themselves, compulsory arbitration would afford a convenient method of setting aside the numerous and troublesome though not serious misunderstandings which sometimes needlessly interrupt diplomatic relations; by means of compulsory arbitration the nations could more easily enforce their lawful claims and, what is still more important, they could more easily avoid compliance with unjustified demands.

Compulsory arbitration would serve the cause of universal

peace to an inestimable extent. It is true that the questions of a secondary character to which this remedy is exclusively applicable very rarely constitute a *casus belli*. Nevertheless, frequent controversies between nations, even though they concern only questions of a secondary nature, while they do not constitute a direct menace to the maintenance of peace, still they impair the good relations between the nations and create an atmosphere of distrust and hostility in which any incident may more easily kindle war as if by casual spark. The effect of compulsory arbitration being to relieve the interested nations from all responsibility with regard to the manner in which a difference between them is to be settled, would seem to contribute toward the maintenance of their friendly relations and in this way facilitate the peaceful settlement of the most serious disputes which might arise with regard to their most important mutual interests.

While thus recognizing the great importance of compulsory arbitration, it is essential above all to specify exactly the sphere of its application. The cases in which compulsory arbitration is applicable must be indicated.

The causes of international disputes are very numerous and are infinitely variable. Nevertheless, whatever be the subject of the dispute, the demands made by any nation on another must come within one of the following categories: (1) One nation demands a material indemnity from another for injuries and losses caused it or one of its citizens or subjects by the acts of the defendant nation or its citizens or subjects which act the first nation does not consider to be in conformity with right. (2) One nation asks another to exercise or not to exercise certain sovereign functions, or to do or not to do certain acts not affecting interests of a material nature.

With regard to disputes of the first category, the application of compulsory arbitration is always possible and desirable. Disputes of this kind relate to questions of law. They do not concern either the national honor of the nations, nor their vital interests, since a nation whose national honor or vital interests had been assailed would obviously not and could not confine itself to demanding a material indemnity for injuries and losses sustained by it. A war, which is always a highly regrettable event, would be divested of all significance and would have

no more justification if it were undertaken on account of a dispute arising with regard to matters of little essential importance, such as accounts to be settled for material injuries caused a nation by acts committed by another and which the former did not consider to be in conformity with right. But the more impossible a war is in such cases the more necessary it is to recommend compulsory arbitration as the most effective method for the specific settlement of disputes of this kind.

The history of international relations proves beyond all doubt that in the great majority of cases demands of indemnity for injuries sustained are the very things which have constituted the subject of arbitration proceedings. The grounds on which these demands are based vary greatly. We will cite, for instance, the violation of the duties of neutrality;<sup>1</sup> the impairment of the rights of neutral nations;<sup>2</sup> the unlawful arrest of a foreign subject;<sup>3</sup> losses caused a foreign subject through the fault of a nation;<sup>4</sup> the seizure of the private property of a belligerent on the mainland;<sup>5</sup> unlawful seizure of vessels;<sup>6</sup> violation of fishing rights.<sup>7</sup>

In general, whatever be the causes or the circumstances of the controversy, the nations find no difficulty in submitting it to arbitration if the question is one of indemnity for injuries and losses. It would therefore seem that the Conference ought to follow this same course by declaring arbitration compulsory for the examination of controversies of the first category. Of course, in exceptional cases or when the pecuniary question involved assumes an unusually great importance, from the standpoint of the nation's interests, for instance in case of the bankruptcy of a nation, every power may invoke the national or its vital interests in order to decline arbitration as a means of settling the dispute.

As far as the disputes of the second category are concerned,

<sup>1</sup> The General Armstrong Case, 1851, and the Alabama Case, 1872.

<sup>2</sup> Blockade of Portendik, 1843, etc.

<sup>3</sup> The Captain White Case, 1864. The Dondonald Case, 1873, etc.

<sup>4</sup> The Butterfield Case, 1888. The conflict between Mexico and the United States, 1872, etc.

<sup>5</sup> The Macedonian Case.

<sup>6</sup> Seizure of the vessels *Veloz*, *Victoria*, and *Vigie*, 1852. Case of the vessel *Phare*, 1879, and others.

<sup>7</sup> Newfoundland Fishery cases, 1877, etc.

they are much more important and constitute a greater menace to universal peace, and it would seem that compulsory arbitration can not and ought not to be applied to them. This category includes controversies of all kinds regarding political treaties and affecting the vital interests and national honor of the nations. Compulsory arbitration would bind the hands of the nation, in these cases, and compel it to assume a passive rôle in questions on which its safety depends in a great measure, that is, in questions in which none can be judge but the sovereign power. In introducing compulsory arbitration into the international life of nations extreme caution should be observed in order not to extend its sphere of application excessively, and thus shake the confidence which it might inspire, or discredit it in the eyes of the governments and peoples.

We must not lose sight of the fact that every nation, and especially every great power, would prefer to propose the abrogation of a treaty establishing compulsory arbitration rather than to submit to it in questions which peremptorily demand that the decision be reached by the sovereign power freely and without interference. At all events, for the sake of the subsequent success of arbitration as an institution, the Conference ought to confine its application to a certain number of questions of law arising with regard to the interpretation of existing treaties and which are divested of all political significance. These treaties should be indicated in advance in an express manner by the Conference, and their enumeration could be added to in time as suggested by the theory and especially the practice of international law.

Among the treaties for the interpretation of which compulsory arbitration ought to be admitted fully and unconditionally we may cite first of all the extensive group of those having universal character and which have constituted a system of international means (international unions) for subserving interests which are likewise international. Such are, for instance, the conventions relating to the postal and telegraph union, to the international defense of copyrights, etc. In the course of time, as the nations are drawn closer together, in their relations, a large number of other moral and material interests will lose their exclusively national character and be raised to the level of interests of the international commonwealth as a whole. It



is an impossible task for a single nation to attend to these interests by its own efforts and means. This is the reason why every year there is an increasing number of treaties having a universal character, embracing many nations, and determining the means and methods of affording common protection to common interests. While other treaties are not, as a general rule, anything but factitious compromises of opposing interests, treaties of a universal character always necessarily represent a concordance of identical and common interests. This is the reason why no serious or inexplicable controversies ever arise or can arise with regard to these treaties, that is, controversies of a national character in which the interests of both parties are reciprocally excluded. With regard to temporary misunderstandings concerning their interpretation, every nation will willingly entrust their settlement to a Court of Arbitration for the reason that all the Powers are equally concerned in having these treaties remain inviolable as constituting the basis of an extensive and complex system of institutions and measures of an international character which are the sole means of satisfying essential and permanent want.

It must be observed that the first attempt to introduce compulsory arbitration into international practice was made by a treaty of a universal character, viz: that relating to the postal union of 1874. Article XVI of this treaty provides for compulsory arbitration as a means of settling all differences arising with regard to the interpretation and application of the treaty in question.

The Conference of The Hague would therefore seem to be perfectly warranted in extending the provision of Article XVI of the Treaty of Berne to all treaties of a universal character which are entirely similar to this one.

At present, all treaties coming within the following two subdivisions may be included within the category of treaties of a universal character which are susceptible of admitting compulsory arbitration:

1. Treaties concluded for the purpose of affording international protection to the great arteries of international communication, postal, telegraph and railroad conventions, conventions for the protection of submarine cables, regulations for the purpose of preventing collisions of vessels on the high seas,

and conventions relating to navigation on international rivers and interoceanic canals.

2. Treaties concluded with a view to affording international protection to intellectual and moral interests, either of particular nations or of the international commonwealth in general. To this subdivision belong conventions relating to literary, artistic and musical copyrights, conventions for the protection of industrial property (trademarks and patents), convention for the use of weights and measures, sanitary conventions, veterinary conventions, and conventions for the measures to be taken against the phylloxera.

Besides treaties of a universal character, compulsory arbitration could also be applied to the settlement of differences arising with regard to the interpretation and application of treaties relating to matters within the special domains of international private, civil and criminal law.

It must be remarked, however, that the most important questions of international private law are now determined by the special legislation of each nation.

By reason of the inconveniences of this class of affairs, resulting in an extreme lack of definiteness with regard to the mutual rights and duties of individuals in international intercourse, the question of forming an international code of private international law has been raised. As long as this question remains undecided, either by the conclusion of separate treaties among the nations or by the conclusion of a treaty of a universal character, it would be more wise to admit compulsory arbitration only in questions relating to the right of succession, which are already regulated to a sufficient extent by international treaties.

As regards questions of international criminal law arising in connection with the interpretation of treaties relating to coöperation among nations in the administration of justice, it would seem that as these questions are exclusively of a special juridical nature they might be decided by means of compulsory arbitration, this means appearing to be equally possible and desirable in this regard for all nations.

Finally, in order to do away with the disputes and misunderstandings which so frequently arise among nations with regard to boundaries, it would also appear entirely appropriate to entrust the interpretation of so-called boundary treaties to compulsory

arbitration for the reason that they have a technical rather than a political character.

These are the limits within which it is possible and desirable to fix the sphere of action of compulsory arbitration.

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There is reason to believe that in the course of time it will become possible to extend compulsory arbitration to cases which we do not yet foresee, but even within the limits indicated above this means of action will afford a great help to the triumph of the great principles of right and justice in the international domain.

The Peace Conference will, by recognizing the use of arbitration as far as possible to be compulsory, by that very act advance nearer to the goal which was proposed for the government of the great Powers in the Congress of Aix la Chapelle of 1818. It will set an example of justice, concord, and moderation; it will devote the efforts of all governments to the protection of the arts of peace, to the advancement of the internal prosperity of nations, and to the elevation of the lofty ideas of religion and morality.<sup>1</sup>

## 2. TREATIES OF ARBITRATION SINCE THE FIRST HAGUE CONFERENCE<sup>2</sup>

Readers of Mr. Holls' excellent volume on the Peace Conference at The Hague will recall that the First Conference attempted to frame and secure the adoption of a treaty of arbitration by which the nations bound themselves to arbitrate a carefully selected list of subjects. It is well known that this attempt failed, owing to the opposition of Germany. As a compromise, Article 19 of the convention for the peaceful adjustment of international differences was adopted:

Independently of existing general or special treaties imposing the obligation to have recourse to arbitration on the part of any of the Signatory Powers, these powers reserve to themselves the right to conclude, either before the ratification of the present convention or subsequent to that date, new agreements, general or special, with a view of extending the obligation

<sup>1</sup> Conférence Internationale de la Paix, 1899, part I, pp. 124-128.

<sup>2</sup> Reprinted from the American Journal of International Law (1908) Vol. II, pp. 921-928.

to submit controversies to arbitration to all cases which they consider suitable for such submission. [Reënacted in 1907 as Article 40.]

The article did not seem at the time to be of any special importance and it was generally looked upon as useless because independent and sovereign States possess the right without special reservation to conclude arbitration agreements, general or special, without being specifically empowered to do so. The fact is, however, that this article, insignificant and useless as it may seem, marks, one may almost say, an era in the history of arbitration. The existence of the article has called attention to the subject of arbitration and by reference to it many States have negotiated arbitration treaties. It is true that there is no legal obligation created by the article and it is difficult to find a moral one, for it is not declared to be the duty of any State to conclude arbitration treaties. The moral effect of the article has, however, been great and salutary, and the existence of numerous arbitration treaties based upon the reservation contained in the article shows the attention and respect which nations pay to the various provisions of The Hague Conference.

The following enumeration of the treaties concluded since the First Hague Conference and an analysis of the *compromis* clauses will therefore be of no little interest—perhaps of considerable value:

Argentine-Bolivia, February 3, 1902.

Argentine-Brazil, September 7, 1905.

Argentine-Chile, May 28, 1902.

Argentine-Paraguay, November 6, 1899.

(3)<sup>1</sup> Austria-Hungary-Great Britain, January 11, 1905

(3) Austria-Hungary-Switzerland, December 3, 1904.

(1) Belgium-Denmark, April 26, 1905.

(1) Belgium-Greece, May 2, 1905.

(1) Belgium-Norway and Sweden, November 30, 1904.

(1) Belgium-Roumania, May 27, 1905.

(1) Belgium-Russia, October 30, 1904.

(1) Belgium-Spain, January 23, 1905.

(1) Belgium-Switzerland, November 15, 1904.

Bolivia-Peru, November 21, 1901.

<sup>1</sup> The figures in parentheses refer to the numbered paragraphs following the list of treaties. These paragraphs describe briefly the nature of the reference clauses.



- (5) Bolivia-Spain, February 17, 1902.
- Colombia-Peru, September 12, 1905.
- (5) Colombia-Spain, December 17, 1902.
- (3) Denmark-France, September 15, 1905.
- (3) Denmark-Great Britain, October 25, 1905.
- (2) Denmark-Italy, December 16, 1905.
- (2) Denmark-Netherlands, February 12, 1904.
- (1) Denmark-Russia, March 1, 1905.
- (1) Denmark-Spain, December 1, 1905.
- (3) France-Great Britain, October 14, 1903.
- (3) France-Italy, December 26, 1903.
- (3) France-Netherlands, April 6, 1904.
- (3) France-Norway and Sweden, July 9, 1904.
- (3) France-Spain, February 26, 1904.
- (3) France-Sweden and Norway, July 9, 1904.
- (3) France-Switzerland, December 14, 1904.
- (3) France-United States, February 10, 1908.
- (3) Germany-Great Britain, July 12, 1904.
- (3) Great Britain-Italy, February 1, 1904.
- (3) Great Britain-Netherlands, February 15, 1905.
- (3) Great Britain-Norway and Sweden, August 11, 1904.
- (3) Great Britain-Portugal, November 16, 1904.
- (3) Great Britain-Spain, February 27, 1904.
- (3) Great Britain-Switzerland, November 16, 1904.
- (3) Great Britain-United States, April 4, 1908.
- (8) Guatemala-Spain, February 28, 1902.
- (6) Honduras-Spain, May 13, 1905.
- (6) International, January 29, 1902.
- (7) International, January 30, 1902.
- Italy-Argentina, September 18, 1907.
- Italy-Mexico, October 16, 1907.
- Italy-Peru, April 18, 1905.
- Italy-Portugal, May 11, 1905.
- (3) Italy-Switzerland, November 23, 1904.
- (8) Mexico-Spain, January 11, 1902.
- (3) Mexico-United States, March 24, 1908.
- Netherlands-Portugal, October 1, 1904.
- (1) Norway-Sweden, October 26, 1905.
- (3) Norway-United States, April 4, 1908.
- (1) Norway and Sweden-Russia, December 9, 1904.

Norway and Sweden–Spain, January 23, 1905.

- (1) Norway and Sweden–Switzerland, December 17, 1904.
- (4) Portugal–Spain, May 31, 1904.
- (3) Portugal–Austria–Hungary, February 13, 1906.
- (10) Portugal–Denmark, March 20, 1907.
- (3) Portugal–France, June 29, 1906.
- (3) Portugal–Great Britain, November 16, 1904.
- (3) Portugal–Italy, May 11, 1905.
- (9) Portugal–Netherlands, October 1, 1904.
- (3) Portugal–Norway and Sweden, May 6, 1905.
- (4) Portugal–Spain, May 31, 1904.
- (3) Portugal–Switzerland, August 18, 1905.
- (1) Russia–Norway and Sweden, November 26, 1904.
- (3) Spain–Switzerland, May 14, 1907.
- (3) Spain–United States, April 20, 1908.
- (5) Spain–Uruguay, January 28, 1902.
- (3) United States–Denmark, May 18, 1908.
- (3) United States–Italy, March 28, 1908.
- (3) United States–Japan, May 5, 1908.
- (3) United States–Netherlands, May 2, 1908.
- (3) United States–Portugal, April 6, 1908.
- (3) United States–Sweden, May 2, 1908.
- (3) United States–Switzerland, February 29, 1908.

#### NOTES.

(1) The article of reference in these treaties is substantially similar to the article in the treaty between Belgium and Russia, which reads as follows:

#### ARTICLE I.

The high contracting parties agree to submit to the Permanent Court of Arbitration established at The Hague by the Convention of July 29, 1899, the differences which may arise between them in the cases enumerated in Article 3, in so far as they affect neither the independence, the honor, the vital interests, nor the exercise of sovereignty of the contracting countries, and provided it has been impossible to obtain an amicable solution by means of direct diplomatic negotiations or by any other method of conciliation.

Article 3, referred to in the above quotation, reads as follows:

Arbitration shall be obligatory between the high contracting parties in the following cases:

1. In case of disputes concerning the application or interpretation of any convention concluded or to be concluded between the high contracting parties and relating—

- a. To matters of international private law;
- b. To the management of companies;
- c. To matters of procedure, either civil or criminal, and to extradition.

2. In cases of disputes concerning pecuniary claims based on damages, when the principle of indemnity has been recognized by the parties.

Differences which may arise with regard to the interpretation or application of a convention concluded or to be concluded between the high contracting parties and in which third powers have participated or to which they have adhered shall be excluded from settlement by arbitration.

The treaty between Norway and Sweden, included among those to which Note 1 refers, differs from the others in that questions as to whether disputes involve the vital interests of either country are to be submitted to The Hague Court instead of being decided by each nation for itself.

In the treaty between Russia and Norway and Sweden, November 26, 1904, no reference is made in Article 1 to Article 3, although the latter article appears in practically the same form as here given, except that the final paragraph is missing.

(2) The reference clause in these treaties is substantially similar to the article in the treaty between Denmark and Italy, which reads as follows:

#### ARTICLE PREMIER.

Les Hautes Parties contractantes s'engagent à soumettre à la Cour permanente d'arbitrage, établie à La Haye par La Convention du 29 juillet 1899, tous les différends de n'importe quelle nature qui viendraient à s'élever entre Elles et qui n'auraient pu être résolus par les voies diplomatiques, et cela même dans le cas où ces différends auraient, leur origine dans des faits antérieurs à la conclusion de la présente Convention.

(3) The reference clause in these treaties is similar, substantially, to that contained in the treaty between France and Great Britain, which reads as follows:

#### ARTICLE I.

Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration, established at The Hague by the convention of the 29th July, 1899; provided, nevertheless, that they do not

affect the vital interests, the independence, or the honor of the two contracting States, and do not concern the interests of third parties.

In the treaty between Mexico and the United States, March 24, 1908, the following clause is inserted after the word diplomacy in the above reference paragraph: "in case no other arbitration should have been agreed upon."

The treaty between Portugal and France, June 29, 1906, requires that the causes of the arbitration shall arise after the date of the treaty.

(4) The reference clause is as follows:

#### ARTICLE 1.

All questions of a judicial character relative to the interpretation of treaties or conventions existing, or hereafter to exist, between Portugal and Spain, bordering and friendly nations, and which questions can not be amicably solved by diplomacy, shall be submitted to a commission, constituted expressly for that purpose, by previous agreement; and in the event of the parties failing to agree upon the constitution of such commission within a term not to exceed one month from the time such commission is proposed by one of the high contracting parties, then the submission shall be to the Permanent Arbitration Tribunal or court instituted at The Hague by virtue of the convention there held on the 29th of June, 1899, provided that the questions so referred and submitted shall not involve matters of vital effect upon the independence or honor of the contracting nations or the interests of other States.

(5) The reference clause is similar to Article 3 of the treaty between Spain and Uruguay, which reads as follows:

#### ARTICLE 3.

Pour le jugement des questions qui, en exécution de la présente convention, seront soumises à un arbitrage, les fonctions d'arbitre seront confiées, de préférence, à un chef d'Etat, d'une des Républiques hispano-américaines ou à un tribunal composé de juges et experts espagnols, uruguayens ou hispano-américaines.

À défaut d'entente sur le choix des arbitres, les Hautes Parties signataires se soumettront au Tribunal international permanent d'arbitrage, établi conformément aux résolutions de la Conférence de la Haye, de 1899, et, dans ce cas, comme dans le cas précédent, elles se conformeront, à la procédure arbitrale spécifiée au chapitre III des dites résolutions.

Article 1 of this treaty reads as follows:

#### ARTICLE PREMIER.

Les Hautes Parties contractantes s'obligent à soumettre à un jugement arbitral toutes les difficultés, de quelque nature qu'elles soient, qui, pour



une cause quelconque, viendraient à surgir entre elles, sauf le cas où ces difficultés porteraient atteinte aux dispositions de la constitution de l'un ou l'autre pays, et à l'exception de celles qui peuvent être résolus par des négociations directes.

(6) Conference of 1902. Treaty of obligatory arbitration between Argentine Republic, Bolivia, Dominican Republic, Guatemala, Mexico, Paraguay, Peru, Salvador, and Uruguay. January 29, 1902. (To Hague if agreeable. All disputes except those affecting national honor or independence).

(7) Conference of 1902. Treaty for arbitration of pecuniary claims between the United States of America, Argentine Republic, Bolivia, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Uruguay. (This provides for reference to The Hague of pecuniary claims.)

(8) The reference clause in the treaty between Guatemala and Spain is substantially similar to that in the treaty between Mexico and Spain, which reads as follows:

#### ARTICLE 3.

For the decision of questions which, in accordance with this treaty, may be submitted to arbitration, the functions of arbitrator shall be conferred with preference upon a chief of State of one of the Spanish-American republics, or upon a tribunal formed of Mexicans, Spanish, or Spanish-American judges and experts.

In the case of not agreeing in the appointment of arbitrators the high contracting parties shall submit themselves to the Permanent International Tribunal of Arbitration established in accordance with the resolutions of The Hague Conference of 1899 with adherence in the latter, and in the former case to the arbitral procedure specified in Chapter III of the said resolutions.

Articles 1 and 2 of this treaty read as follows:

#### ARTICLE I.

The high contracting parties agree to submit to the decision of arbitrators all controversies which may arise between them during the existence of the present treaty in which they might not have been able to reach an amicable solution by direct negotiation; provided that said controversies affect neither the national independence nor honor.

ART. 2. Neither the national independence nor honor shall be considered to be compromised in the following cases:

A. When treating of pecuniary damages and prejudices suffered by one of the contracting States or by its citizens because of illegal acts or omissions on the part of the other contracting State or its citizens.

B. When treating of the interpretation of the treaties, agreements, and conventions relating to the protection of ownership of artistic, literary, and industrial property, as well as to that of privileges, patents of inventions, trademarks, mercantile firms, money, weights and measures, and sanitary precautions, either veterinary or to exclude phylloxera.

C. When treating of the application of treaties, agreements, and conventions relating to successions, aid, and judicial correspondence.

D. When treating of treaties, agreements, and conventions now in force, or which may be celebrated hereafter, with the object of putting the principles of public or private international law, either civil or penal, into practice.

E. When treating of questions which relate to the interpretation or execution of treaties, agreements, and conventions of friendship, commerce, and navigation.

(9) In this treaty the contracting Powers agree to submit to The Hague Tribunal all difficulties which they had agreed to arbitrate previous to the signing of The Hague Convention of 1899 for the pacific settlement of international disputes.

(10) The reference articles of this treaty read as follows:

#### ARTICLE I.

Les Hautes Parties Contractantes s'engagent à soumettre à l'arbitrage tous les différends de n'importe quelle nature qui viendraient à s'élever entre Elles et qui n'auraient pu être résolus par les voies diplomatiques. Elles s'adresseront à cet effet à la Cour permanente d'arbitrage, établie à la Haye par la Convention du 29 juillet 1899, à moins, d'être convenues d'un tribunal arbitral différent.

#### ARTICLE IV.

Il est entendu qu'à moins que la controverse ne porte sur l'application d'une convention entre les deux Etats, ou qu'il ne s'agisse d'un cas de déni de justice, l'article 1<sup>er</sup> ne sera pas applicable aux différends qui pourraient s'élever entre un ressortissant de l'une des Parties et l'autre Etat Contractant lorsque les tribunaux auront, d'après la législation de cet Etat, compétence pour juger la contestation.

Those treaties in the list which are not referred to in the foregoing notes make no reference to The Hague Tribunal.

## APPENDIX TO CHAPTER IX

### 1. ARTICLES OF CONFEDERATION, 1781

#### EXTRACT FROM ARTICLE 9.

The United States, in Congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned, provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the Supreme or Superior Court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judg-

ment, without favor, affection, or hope of reward." Provided, also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions, as they may respect such lands and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

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## 2. PROPOSITION OF THE AMERICAN DELEGATION

### REGARDING THE PERMANENT COURT OF ARBITRATION

#### I

A Permanent Court of Arbitration shall be organized, to consist of fifteen judges of the highest moral standing and of recognized competency in questions of international law. They and their successors shall be appointed in the manner to be determined by this Conference, but they shall be so chosen from the different countries that the various systems of law and procedure and the principal languages shall be suitably represented in the personnel of the court. They shall be appointed for — years, or until their successors have been appointed and have accepted.

#### II

The Permanent Court shall convene annually at The Hague on a specified date and shall remain in session as long as necessary. It shall elect its own officers and, saving the stipulations of the convention, it shall draw up its own regulations. Every decision shall be reached by a majority, and nine members shall constitute a quorum. The judges shall be equal in rank, shall enjoy diplomatic immunity, and shall receive a salary sufficient to enable them to devote their time to the consideration of the matters brought before them.



## III

In no case (unless the parties expressly consent thereto) shall a judge take part in the consideration or decision of any case before the court when his nation is a party therein.

## IV

The Permanent Court shall be competent to take cognizance and determine all cases involving differences of an international character between sovereign nations, which it has been impossible to settle through diplomatic channels and which have been submitted to it by agreement between the parties, either originally or for review or revision, or in order to determine the relative rights, duties or obligations in accordance with the finding, decisions, or awards of commissions of inquiry and specially constituted tribunals of arbitration.

## V

The judges of the Permanent Court shall be competent to act as judges in any Commission of Inquiry or Special Tribunal of Arbitration which may be constituted by any Power for the consideration of any matter which may be specially referred to it and which must be determined by it.

## VI

The present Permanent Court of Arbitration might, as far as possible, constitute the basis of the court, care being taken that the Powers which recently signed the Convention of 1899 are represented in it.<sup>1</sup>

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, vol. II, First Commission, Annex 11.

### 3. SUGGESTED COMPOSITION OF THE COURT OF ARBITRAL JUSTICE.<sup>1</sup>

TABLE A

Suggested composition of the Court of Arbitral Justice, to consist of seventeen judges, for each year of the period of twelve years, during which the convention shall be in force.

[As Germany, United States, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia were to sit permanently in the court they are omitted from the table and only the countries are given whose judges were to sit in rotation for a longer or shorter period.]

	JUDGES	DEPUTY JUDGES	JUDGES	DEPUTY JUDGES
	<i>1st Year</i>		<i>4th Year</i>	
1	Argentine		Brazil	
2	Belgium		Chili	
3	Bolivia		Cuba	
4	China		Denmark	
5	Spain		Greece	
6	Netherlands		Netherlands	
7	Roumania		Portugal	
8	Sweden		Siam	
9	Turkey		Turkey	
	<i>2d Year</i>		<i>5th Year</i>	
1	Argentine		Dominican Republic	
2	Belgium		Ecuador	
3	China		Spain	
4	Columbia		Mexico	
5	Spain		Norway	
6	Netherlands		Netherlands	
7	Roumania		Servia	
8	Sweden		Switzerland	
9	Turkey		Turkey	
	<i>3d Year</i>		<i>6th Year</i>	
1	Brazil		Bulgaria	
2	Chili		Spain	
3	Costa Rica		Guatemala	
4	Denmark		Haiti	
5	Spain		Luxemburg	
6	Greece		Mexico	
7	Netherlands		Norway	
8	Portugal		Persia	
9	Turkey		Switzerland	

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, vol. II, First Commission, 1st Sub-Commission Committee of Examination B, Second Session, August 17, 1907.

	JUDGES	DEPUTY JUDGES	JUDGES	DEPUTY JUDGES
	<i>7th Year</i>		<i>10th Year</i>	
1	Argentine		Brazil	
2	Belgium		Chili	
3	China		Denmark	
4	Spain		Greece	
5	Honduras		Paraguay	
6	Netherlands		Netherlands	
7	Roumania		Portugal	
8	Sweden		Siam	
9	Turkey		Turkey	
	<i>8th Year</i>		<i>11th Year</i>	
1	Argentine		Spain	
2	Belgium		Mexico	
3	China		Norway	
4	Spain		Netherlands	
5			Peru	
6	Netherlands		Salvador	
7	Roumania		Servia	
8	Sweden		Switzerland	
9	Turkey		Turkey	
	<i>9th Year</i>		<i>12th Year</i>	
1	Brazil		Bulgaria	
2	Chili		Spain	
3	Denmark		Mexico	
4	Spain		Montenegro	
5	Greece		Norway	
6	Panama		Persia	
7	Netherlands		Switzerland	
8	Portugal		Uruguay	
9	Turkey		Venezuela	

TABLE B

The proposed arrangement and distribution of Judges and Deputy Judges among the Powers represented for less than the full period of the convention.

[It is unnecessary to insert the deputy judges of the Powers continually represented because each one of such Powers was to possess a deputy judge for the full period of the Convention.]

	JUDGES	DEPUTY JUDGES		JUDGES	DEPUTY JUDGES
	<i>Years</i>	<i>Years</i>		<i>Years</i>	<i>Years</i>
Spain.....	10	10	Bolivia.....	1	1
Netherlands.....	10	10	Colombia.....	1	1
Turkey.....	10	10	Costa Rica.....	1	1
Argentine.....	4	4	Cuba.....	1	1
Belgium.....	4	4	Dominican Re- public.....	1	1
Brazil.....	4	4	Ecuador.....	1	1
Chili.....	4	4	Guatemala.....	1	1
China.....	4	4	Haiti.....	1	1
Denmark.....	4	4	Honduras.....	1	1
Greece.....	4	4	Luxemburg....	1	1
Mexico.....	4	4	Montenegro....	1	1
Norway.....	4	4	Nicaragua.....	1	1
Portugal.....	4	4	Panama.....	1	1
Roumania.....	4	4	Paraguay.....	1	1
Sweden.....	4	4	Peru.....	1	1
Switzerland.....	4	4	Salvador.....	1	1
Bulgaria.....	2	2	Uruguay.....	1	1
Persia.....	2	2	Venezuela.....	1	1
Servia.....	2	2			
Siam.....	2	2			
	90	90		18	18



## APPENDIX TO CHAPTER XI

### ADDITIONS PROPOSED BY GERMANY TO THE CONVENTION CONCERNING THE LAWS AND CUSTOMS OF WAR ON LAND

#### SECTION V

#### THE TREATMENT OF NEUTRAL PERSONS IN THE TERRITORY OF BELLIGERENTS.

##### CHAPTER I

##### *Definition of a neutral person*

##### ARTICLE 61

The nationals of a State which is not taking part in a war are considered as neutrals.

##### ARTICLE 62

A violation of neutrality involves loss of character as a neutral person with respect to all the belligerents. There is a violation of neutrality—

*a.* If the neutral person commits hostile acts against a belligerent;

*b.* If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed forces of one of the parties.

##### ARTICLE 63

The following acts shall not be considered as committed in favor of one belligerent in the sense of Article 62, Paragraph (*b*):

*a.* Supplies furnished or loans made to one of the belligerents, provided that they do not come from enemy territory or territory occupied by the enemy.

*b.* Services rendered in matters of police or civil administration.

##### CHAPTER II

##### *Services rendered by neutral persons*

##### ARTICLE 64

Belligerents shall not solicit neutral persons to render their service, although they (the interested persons) may consent to it.

The following shall be considered as services of war:

Any assistance by a neutral person in the armed forces of the belligerents, in the character of combatant or adviser, and, if he shall have submitted to the laws, regulations or orders in force by the said army, of other classes also, for example, secretary, servant, or cook. Services under guise of an ecclesiast and health officer are excepted.

#### ARTICLE 65

Neutral powers engage to prohibit their nationals from enlisting in the military service of the army of either of the belligerents.

#### ARTICLE 66

Neutral persons shall not be obliged, against their will, to lend services, not considered services of war, to the armed force of either belligerents.

It shall be permitted, nevertheless, to demand sanitary or police services, disconnected with actual hostilities. Such services shall be paid in cash, provided it is possible to do so. If not paid in cash, the necessary formal receipts shall be given.

### CHAPTER III

#### *Concerning property of neutral persons*

#### ARTICLE 67

No war tax shall be demanded from neutral persons.

A war tax is deemed to be any requisition demanded expressly for the purposes of the war.

The enforcement of laws and existing tolls, or of contributions especially decreed by one of the belligerents, in the enemy territory which it may occupy, for the necessities of the administration of that territory, are not deemed to be contributions of war.

#### ARTICLE 68

The property of a neutral shall not be destroyed, misused, or injured unless required by the exigencies of war. In such event, the belligerent is not obliged to pay an indemnity in its own country or in the enemy country, except when the nationals of another neutral country or of his own may enjoy equal indemnification and reciprocity may be guaranteed.

## ARTICLE 69

The belligerent shall make compensation for the use of neutral real property, in the enemy country, the same as in its own country, provided that reciprocity is guaranteed in the neutral State. In no case shall this indemnity be greater than that provided by the legislation of the enemy country in case of war.

## ARTICLE 70

Belligerents may expropriate and use for military purposes, and without immediate reimbursement and cash payment, all neutral movable property found in its country.

They may do the same in enemy country, within the limits and under the conditions specified in Article 52.

## ARTICLE 71

Neutral vessels and their cargoes shall not be expropriated by a belligerent, except when they are used for river navigation within its territory or within the enemy territory.

The indemnity shall equal, in the event of expropriation, the actual valuation of the vessel and of the cargo and 10 per cent more. In the event of the employment of the vessel, the compensation shall be 10 per cent more than the customary freight. These payments shall be made immediately and in cash.

## ARTICLE 72

Indemnity for the destruction or injury of neutral personal property, due solely to their use for military purposes, shall be regulated in conformity with the principles established in Articles 70 and 71.<sup>1</sup>

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, vol. III, pp. 268-270.

## APPENDIX TO CHAPTER XII

### DRAFT OF REGULATIONS CONCERNING THE LAYING OF AUTOMATIC SUBMARINE CONTACT MINES

#### ARTICLE 1.

It is forbidden:

1. To lay unanchored automatic contact mines which do not become harmless one hour at most after the person who laid them ceases to control them;

2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;

3. To use torpedoes which do not become harmless when they have missed their mark.

#### ARTICLE 2.

It is forbidden to lay anchored automatic contact mines beyond a distance of three nautical miles from high water mark, throughout the length of the coast line, as well as along the islands and islets adjacent thereto.

In the case of bays, the zone of three nautical miles shall be measured starting from a straight line drawn across the bay in its part nearest the entrance at the first point where the opening does not exceed ten miles in width.

#### ARTICLE 3.

The limit for the laying of anchored automatic contact mines is extended to a distance of ten nautical miles off military ports and ports where there are either military arsenals or establishments of naval construction or repair.

As military ports are considered those ports which have been decreed as such by the Nation to which they belong.



## ARTICLE 4.

Off the coasts and ports of their adversaries, the belligerents may lay anchored automatic contact mines within the limits indicated in the two preceding articles.

However, they shall not exceed the limit of three nautical miles off ports which are not military ports, unless establishments of naval construction or repair belonging to the Nation are situated therein.

It is forbidden to lay automatic contact mines off the coasts and ports of the enemy for the sole purpose of intercepting commercial shipping.

## ARTICLE 5.

Within the sphere of their immediate activity, the belligerents have likewise a right to lay anchored automatic contact mines outside the limits fixed in Articles 2 to 4 of the present Regulations.

Mines used outside the limits fixed in Articles 2 to 4 must be so constructed as to become harmless within two hours at most after the person using them has abandoned them.

## ARTICLE 6.

When anchored automatic contact mines are used, all possible precautions should be taken to insure safety of navigation.

The belligerents undertake, in case these mines should cease to be under surveillance, to notify the danger zones as soon as possible by a notice to shipowners, communicated also to the Governments through the diplomatic channel, and to do their utmost to render them harmless within a limited time.

## ARTICLE 7.

Any neutral Nation which lays automatic contact mines off its coasts must observe the same rules and take the same precautions as are imposed on belligerent Nations in the use of similar mines.

However, a neutral Nation shall not anchor mines outside the limits indicated in Article 2.

A neutral Nation must make known to shipowners, by a

previous notice, the localities in which automatic contact mines are to be anchored. Such notice shall be communicated without delay to the Governments through diplomatic channels.

#### ARTICLE 8.

At the end of the war, at the latest, the Signatory Nations shall be obliged to do all in their power to remove, respectively, the mines which they have each laid.

As regards anchored automatic contact mines which one of the belligerents may have laid along the coasts of the other, the Signatory Nations agree to notify the other party of their location, and each Nation must proceed, with the least possible delay, to remove the mines situated in its waters.

#### ARTICLE 9.

The Signatory Nations which do not yet possess improved mines such as are prescribed in the present Regulations, and which are consequently unable to observe the rules laid down in Articles 1 and 6, agree to transform their stock of mines as soon as possible in order to make them conform to the aforementioned rules.

Until a belligerent has become supplied with mines constructed so as to fulfill the conditions of Article 5, paragraph 2, he is forbidden to lay anchored automatic contact mines outside the limits fixed in Articles 2 to 4.

It is forbidden to use unanchored automatic contact mines which do not fulfill the condition stipulated in Article 1, paragraph 1, one year after the present Convention goes into force.

#### ARTICLE 10.

The stipulations of the present Convention are concluded for a period of 5 years from the date on which the present Convention takes effect.

The Signatory Powers express the hope that they may have occasion to resume consideration of the question of the use of submarine mines before the expiration of the period provided in the foregoing paragraph.<sup>1</sup>

<sup>1</sup> La Deuxième Conférence Internationale de la Paix, 1907, Vol. III, pp. 427-428.



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